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NORTH CAROLINA REPORTS.

VOL. 114.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1894.

REPORTED BY

ROBERT T. GRAY.

(VOL. III).

RALEIGH:
JOSEPHUS DANIELS, STATE PRINTER AND BINDER.
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1894.

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v.114

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

FEBRUARY TERM, 1894.

CHIEF JUSTICE:

JAMES E. SHEPHERD.

ASSOCIATE JUSTICES:

ALPHONSO C. AVERY,	JAMES C. MACRAE,
WALTER CLARK,	ARMISTEAD BURWELL.

ATTORNEY GENERAL:

FRANK I. OSBORNE.

SUPREME COURT REPORTER:

ROBERT T. GRAY.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

MARSHAL AND LIBRARIAN OF THE SUPREME COURT:

ROBERT H. BRADLEY.

108086

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Geo. H. Brown, Jr.,	1st District.	J. D. McIver,	7th District.
Henry R. Bryan,	2d "	R. F. Armfield,	8th "
Jacob Battle,	3d "	Jesse F. Graves,	9th "
Spier Whitaker,	4th "	John Gray Bynum,	10th "
Robert W. Winston,	5th "	W. A. Hoke,	11th "
E. T. Boykin,	6th "	Geo. A. Shuford,	12th "

SOLICITORS.

John H. Blount,	1st District.	Frank McNeill,	7th District.
Geo. H. White,	2d "	Benjamin F. Long,	8th "
J. E. Woodard,	3d "	W. W. Barber,	9th "
E. W. Pou,	4th "	W. C. Newland,	10th "
E. S. Parker,	5th "	James L. Webb,	11th "
Oliver H. Allen,	6th "	G. A. Jones,	12th "

JUDGES OF THE CRIMINAL COURTS.

FOR NEW HANOVER AND MECKLENBURG COUNTIES:

Oliver P. Meares.

FOR BUNCOMBE COUNTY:

Thomas A. Jones.

SOLICITORS OF THE CRIMINAL COURTS.

Alfred M. Waddell------------------------for New Hanover County.
John E. Brown ------------------------------for Mecklenburg County.
E. D. Carter--------------------------------for Buncombe County.

LICENSED ATTORNEYS.

SEPTEMBER TERM, 1893.

Henry S. Anderson	Henderson County.
Isaac E. Avery	Burke County.
Willie L. Baird	Buncombe County.
William P. Blair	Pennsylvania.
Aubrey L. Brooks	Person County.
George E. Butler	Sampson County.
Littleton C. Carter	Wilkes County.
Henry H. Covington	Cumberland County.
Thomas C. Daniels	Craven County.
William A. Devin	Granville County.
James W. Ferguson	Haywood County.
Howard A. Foushee	Person County.
Solomon Gallert	Rutherford County.
Fred A. Green	Durham County.
Harry P. Greer	Iredell County.
Dallas M. Hardy	Wayne County.
Howard J. Herrick	Edgecombe County.
Marion L. Holcombe	Haywood County.
William P. Hubbard	Sampson County.
James H. Johnson	Cumberland County.
Thornwell Lanier	Granville County.
James C. Linney	Alexander County.
Addison G. Mangum	Durham County.
John H. Martin	Buncombe County.
William T. McCarthy	Craven County.
Charles O. McMichael	Guilford County.
John McC. Morgan	Johnston County.
John F. Musselwhite	Cumberland County.
John B. Parkinson	Florida.
John L. Randleman	Rowan County.
Daniel L. Russell, Jr.	New Hanover County.
John S. B. Stevens	Buncombe County.
Charles E. Turner	Iredell County.
Hallett S. Ward	Hertford County.
James A. Wellons	Johnston County.

LICENSED ATTORNEYS.

FEBRUARY TERM, 1894.

Frank Armfield	Union County.
Harrison Baird	Guilford County.
Samuel J. Black	Mitchell County.
Victor H. Boyden	Rowan County.
E. W. Cannady	Person County.
L. B. Capehart	Wake County.
Plato Collins	Lenoir County.
James H. Cooper	Buncombe County.
W. H. Cox	Richmond County.
Adam Cuningham	Buncombe County.
S. J. Durham	Granville County.
James Y. Eaton	Vance County.
Herbert R. Ferguson	Haywood County.
L. V. Grady	Duplin County.
Benjamin T. Hodge	Wilkes County.
Thomes M. Hufham	Edgecombe County.
B. A. Justice	Rutherford County.
Alexander Lassiter	Bertie County.
William D. Merritt	Person County.
Larry I. Moore	Nash County.
John F. Moore	Rockingham County.
Walter Murphy	Rowan County.
John R. McCreary	Davidson County.
John A. Narron	Johnston County.
Brevard Nixon	Gaston County.
James W. Pless	Henderson County.
Weldon T. Smith	Wake County.
Frederick W. Thomas	Buncombe County.
Thomas C. Van der Veer	New Hanover County.
L. C. VanNoppen	Durham County.
William W. Vass, Jr.	Wake County.
Edwin Y. Webb	Cleveland County.
Harry W. Whedbee	Pitt County.
Charles D. Wildes	Wake County.
O. H. Sumpter	Arkansas.
E. A. R. Kern	New York.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1894 AND SPRING OF 1895.

SUPREME COURT.

The Supreme Court will meet in the city of Raleigh on the last Monday in September, 1894, and the first Monday in February, 1895. The examination of applicants for license to practice law takes place on Friday and Saturday next preceding the meeting of the Court. The docket for the hearing of cases from the First Judicial District will be called on the Tuesday next succeeding the meeting of the Court, and from the other Districts on Tuesday of each succeeding week, in numerical order, until all the Districts have been called.

SUPERIOR COURTS.

Fall Terms date from July 1 to December 31.
Spring Terms date from January 1 to June 30.

NOTE.—The dates of the later Terms of Court to be held in the Spring of 1895 are subject to be changed by the General Assembly of 1895.

The bracketed numeral following the date of a term indicates the number of weeks during which the Court may hold.

FIRST JUDICIAL DISTRICT.

FALL TERM, 1894—Judge McIver.
SPRING TERM, 1895—Judge Boykin.

Beaufort—Nov. 26 (2), ‡Feb. 18 (2), May 27 (2).
Currituck—Sept. 3 (1), Mar. 4 (1).
Camden—Sept. 10 (1), Mar. 11 (1).
Pasquotank—Sept. 17 (1), Mar. 18 (1).
Perquimans—Sept. 24 (1), Mar. 25 (1).
Chowan—Oct. 1 (1), April 1 (1).
Gates—Oct. 8 (1), April 8 (1).
Hertford—Oct. 15 (1), April 15 (1).
Washington—Nov. 5 (1), May 6 (1).
Tyrrell—Oct. 22 (1), April 22 (1).
Dare—Oct. 29 (1), April 29 (1).
Hyde—Nov. 12 (1), May 13 (1).
Pamlico—Nov. 19 (1), May 20 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Armfield.
SPRING TERM, 1895—Judge McIver.

Bertie—Oct. 29 (1), Feb. 4 (1), April 29 (2).
Craven—Nov. 26 (2), ‡Feb. 11 (2), May 27 (2).
Halifax—Nov. 12 (2), ‡Mar. 4 (2), May 13 (2).
Warren—Sept. 17 (2), Mar. 18 (2).
Northampton—†Aug. 6 (2), Oct. 1 (2), April 1 (2).
Edgecombe—Oct. 15 (2), April 15 (2).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Graves.
SPRING TERM, 1895—Judge Armfield.

Pitt—Sept. 17, (2), †Dec. 3 (2), Jan. 7 (2), †Mar. 4 (2), April 1 (2).
Franklin—Oct. 22 (1), Jan. 21, (2), April 15 (2).
Wilson—Oct. 29 (2), ‡Feb. 4 (2), Jan. 3 (1).
Vance—Oct. 1 (2), Feb. 18 (2), May 20 (2).
Martin—Sept. 3 (2), Mar. 18 (2).
Nash—Nov. 19 (2), April 29 (2).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Bynum.
SPRING TERM, 1895—Judge Graves.

Wake—*Sept. 24 (2), †Oct. 22 (3), *Jan. 7 (2), †Feb. 25 (2), *Mar. 25 (2), †April 22 (2).
Wayne—Sept. 10, (2), Oct. 15 (1), Jan. 21 (2), April 15 (1).
Harnett—Aug. 6 (1), ‡Nov. 26 (1), Feb. 4 (1).
Johnston—Aug. 27 (2), Nov. 12 (2), March 11 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Hoke.
SPRING TERM, 1895—Judge Bynum.

Durham—Oct. 8 (2), Jan. 14 (2), Mar. 25 (2), June 3 (2).
Granville—July 23 (2), Nov. 26 (2), Jan. 28 (2), April 22 (2).
Chatham—Sept. 24 (2), Feb. 11 (1), May 6 (1).
Guilford—Aug. 27 (2), Dec. 10 (2), Feb. 18 (2), May 27 (1).
Alamance—Nov. 12 (1), Mar. 11 (1), May 20 (1).
Orange—Aug. 6 (1), Oct. 29 (1), Mar. 18 (1).
Caswell—Aug. 13 (1), Oct. 22 (1), April 8 (1).
Person—Aug. 20 (1), Nov. 19 (1), April 15 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Shuford.
SPRING TERM, 1895—Judge Hoke.

New Hanover—†Sept. 24 (2), †Jan. 21 (2). †April 15 (2).
Sampson—Oct. 8 (2), Feb. 4 (2), April 29 (1).
Duplin—Aug. 6 (1), Dec. 3 (1), Feb. 18 (1).
Greene—Aug. 13 (1), Nov. 26 (1), Feb. 25 (1).
Pender, Sept. 10 (2), Mar. 4 (1).
Carteret—Oct. 22 (1), Mar. 18 (1).
Jones—Oct. 29 (1), Mar. 25 (1).
Onslow, Nov. 5 (1), April 1 (1).
Lenoir—Nov. 12 (2), May 6 (2).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Brown.
SPRING TERM, 1895—Judge Shuford.

Anson—*Sept. 3 (1), †Nov. 26 (1), *Jan. 7 (1), †April 29 (1).
Cumberland, July 23 (1), †Nov. 12 (2), Jan. 21 (1), †May 6 (2).
Robeson—Oct. 1 (3), Jan 28 (2), *May 20 (1).
Richmond—Sept. 17 (2), Dec. 3 (1), Feb. 11 (2), June 3 (1).
Columbus—July 16 (1), Nov. 5 (1), Feb. 25 (1).
Moore—*Aug. 13 (1), †Aug. 20 (2), *Dec. 10 (1), †Dec. 17 (1), Mar. 4 (2).
Bladen—Oct. 23 (Tuesday) (1), March 19 (Tuesday) (2).
Brunswick—Sept. 10 (1), April 8 (1).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Bryan.
SPRING TERM, 1895—Judge Brown.

Cabarrus—July 23 (2) Jan. 21 (2).
Iredell—Aug. 6 (2), Nov. 5 (2), Feb. 4 (2), May 20 (2).
Rowan—Aug. 20 (2), Nov. 19 (2), Feb. 18 (2), May 6 (2).
Davidson—Sept. 3 (2), Mar. 4 (2).
Randolph—Sept. 17 (2), Mar. 18 (2).
Montgomery—Oct. 1 (2), April 1 (1).
Yadkin—Oct. 15 (2), April 15 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Battle.
SPRING TERM, 1895—Judge Bryan.

Alexander—July 23 (1), Jan. 21 (1).
Rockingham—July 30 (1), Nov. 5 (2), Jan. 28 (2).
Forsyth—Aug. 6 (2), Dec. 3 (2), Feb. 25 (1), May 20 (2).
Wilkes—Sept. 3 (2), March 4 (2).
Alleghany—Sept. 17 (1), April 1 (1).
Davie—Sept. 24 (2), April 8 (2).
Stokes—Oct. 22 (2), April 22 (2).
Surry—Oct. 8 (2), March 18 (2).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Allen (succeeding Judge Whitaker, resigned Aug 20, 1894).
SPRING TERM, 1895—Judge Battle.

Catawba—July 23 (2), Feb. 18 (2).
McDowell—Aug. 20 (2), March 4 (2).
Burke—Sept. 3 (2), March 18 (2).
Caldwell—Sept. 17 (1), April 1 (2).
Ashe—Sept. 24 (2), April 15 (2).
Watauga—Oct. 8 (1), April 29 (1).
Mitchell—Oct. 15 (2), May 6 (1).
Yancey—Oct. 29 (2), May 13 (2).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Winston.
SPRING TERM, 1895—Judge Allen.

Union—Aug. 20 (2), Jan. 28 (3).
Stanly—Sept. 17 (2), Feb. 18 (2).
Mecklenburg—†Sept. 3 (2), †Dec. 17 (1), †March 4 (2), †June 3 (1).
Gaston—Oct. 1 (2), March 18 (2).
Lincoln—Oct. 15 (1), April 1 (2).
Cleveland—Aug. 6 (2), Oct. 22 (2), April 15 (2).
Rutherford—Nov. 5 (2), April 29 (2).
Polk—Nov. 19 (1), May 13 (1).
Henderson—Nov. 26 (2), May 20 (2).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1894—Judge Boykin.
SPRING TERM, 1895—Judge Winston.

Madison—July 30 (2), Feb. 25 (2).
Buncombe—†Aug. 13 (3), †Dec. 3 (2), †Mar. 11 (3).
Transylvania—Sept. 3 (1), April 1 (1).
Haywood—Sept. 10 (2), April 8 (2).
Jackson—Sept. 24 (1), April 22 (2).
Macon—Oct. 1 (1), May 6 (1).
Clay—Oct. 8 (1), May 13 (1).
Cherokee—Oct. 15 (2), May 20 (2).
Graham—Oct. 29 (1), June 3 (1).
Swain—Nov. 19 (2), June 10 (1).

*For criminal cases only.
†For civil cases only.
‡For civil cases alone, except jail cases.

CRIMINAL COURTS.

NEW HANOVER COUNTY.—Oliver P. Meares, Wilmington, Judge; Alfred M. Waddell, Wilmington, Solicitor. Court begins July 16, September 17, November 19, January 7, March 18 and May 20.

MECKLENBURG COUNTY.—Oliver P. Meares, Wilmington, Judge; John E. Brown, Charlotte, Solicitor. Court begins August 13, October 8, December 3, February 11, April 8.

BUNCOMBE COUNTY.—Thomas A. Jones, Asheville, Judge; E. D. Carter, Asheville, Solicitor. Court begins July 23, October 22, January 28, April 22.

U S. CIRCUIT AND DISTRICT COURTS.

EASTERN DISTRICT.—A. S. Seymour, Newbern, Judge: *Elizabeth City*—District Court—October 15, 1894; April 15, 1895. *Newbern*—District Court—October 22, 1894; April 22, 1895. *Wilmington*—Circuit and District Court—October 29, 1894; April 29, 1895. *Raleigh*—Circuit Court—December 3, 1894; May 27, 1895.

WESTERN DISTRICT.—R. P. Dick, Greensboro, Judge: Greensboro—Circuit and District—October 1, 1894; April 1, 1895. *Statesville*—Circuit and District—October 15, 1894; April 15, 1895. *Asheville*—Circuit and District—October 29, 1894; April 29, 1895. *Charlotte*—Circuit and District—December 10, 1894; June 10, 1895.

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ERRATUM.

Insert the word "not" after the word "shall" in line 11 of page 89.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1894.

E. F. AYDLETT v. A. L. PENDLETON et al.

Lease Contract, construction of—Lease Terminable upon Sale of Land by Lessor—Sale, what constitutes—Notice—Former Adjudication.

1. Where a contract of lease of land made to enable the lessee to erect a building thereon provided that the lessee and his assigns should have entire control of such building and that the lease should continue until the lessors should sell the lot, the latter to give the lessee and his assigns thirty days' notice after the sale to remove the building, etc.; and further, that the lease should "be determined only on the sale of the land and the giving of the thirty days' notice, as hereinbefore mentioned": *Held*, that the true intent and effect of such provisions were that the lease should terminate whenever the lessors should dispose of all their interest in the land so leased, and that the lessees should have thirty days' notice of such sale to enter upon the lot and remove the building.
2. Where a lease was, by its terms, terminable upon the sale of the land by the lessor, and the latter conveyed the land to his wife for life with remainder over and he and his wife thereafter executed a

mortgage upon the wife's life estate, which was sold under the power of sale contained in the mortgage: *Held* (1), that such conveyances constituted a "sale" of the land and terminated the lease; (2), that the purchaser of the said life estate was the proper person to give to the occupants of the lot notice that the lease was ended and that they should take notice of that fact and conform to the terms of the lease, and the failure of the remaindermen to join such purchaser in giving the notice cannot affect the latter's rights; (3), a notice by such purchaser to the occupants of the lot that he had purchased the lot and that the lease was ended was sufficient, although it did not specifically require the removal of the building.

3. Where a lease by A. and wife of the land of A. provided that it should terminate upon the sale of the land by the lessors and A. conveyed his interest in the land to his wife for life with remainder over, and in a suit by the wife against the lessee for possession upon the ground that the conveyance by the husband terminated the lease it was adjudged that the lease had not been determined, such adjudication could not affect the rights of a subsequent purchaser of the wife's life estate in a suit for possession upon the ground that the sale by both the husband and wife of their interest in the land had terminated the lease.

CIVIL ACTION, tried before *Graves, J.*, at Fall Term, 1893, of PASQUOTANK Superior Court.

From a judgment for the defendant the plaintiff appealed.

The facts sufficiently appear in the opinion of Associate Justice BURWELL.

Messrs. Grandy & Aydlett, for plaintiff (appellant).
Mr. W. J. Griffin, for appellees.

BURWELL, J.: In this action to recover possession of land the defendant A. L. Pendleton, Jr., alleges in his answer that he holds the premises as assignee of a lease thereof made by A. L. Pendleton, Sr., and his wife, Jane R. Pendleton, in 1878, to one Kramer; and he avers that the plaintiff is the owner of an estate in said land for the life of

Mrs. Jane R. Pendleton, who is now living, but he insists that, notwithstanding plaintiff's title, he should not be required to surrender possession to him, for the reason that the lease mentioned above has not been determined. That lease was made, as was therein expressed, "for the purpose of permitting D. S. Kramer to erect a building on said lot," the rents of which were to be collected by the lessee, and one-third thereof was to be paid to the lessors, A. L. Pendleton and wife, Jane R. Pendleton, "for the use and occupation of said land." This lease contained the further stipulation, "that the said D. S. Kramer and his assigns are to have entire control and management of said building after the same shall have been erected, and remove the same off the land of said Pendleton and wife after thirty days' notice in writing from them to do so. A. L. Pendleton and wife further agree with said Kramer and his executors, administrators and assigns that the lease of said land shall continue until they sell said lot, and after sale they agree to give Kramer and his assigns thirty days' notice to remove said building, and to place the same on their land adjoining said lot, provided they own the same at the time, upon the same terms and conditions as are provided in this lease. It is further agreed by the parties to this instrument that the lease shall be determined only on the sale of the land and the giving of thirty days' notice, as hereinafter mentioned, and the said Pendleton and wife shall have a lien on said building for one-third of the rent actually received and not paid to them or their assigns. It is further agreed between the parties that the one-third rent for said building so received shall be paid to Pendleton and wife within five days after the receipt of the same."

We construe these provisions to mean that the term of this lease was to end whenever the lessors, A. L. Pendleton and his wife, Jane R. Pendleton, should dispose of all their interest in the land so leased. It was to continue in force, they stipulated, until they sold the lot, but they agreed that after its determination by that act of theirs the lessees should be allowed to remove the building to be erected by them at any time within thirty days after notice. The expression, "that the lease shall be determined only on the sale of the land and the giving of thirty days' notice," must be considered in connection with what precedes it. The act of selling the lot when consummated by the lessors, the parties agreed, should work a determination of the relation of landlord and tenant created by the contract, but the lessees had the right, as we have said, within the period prescribed to enter upon the premises to remove the building put thereon by them under the terms of the lease.

We come, therefore, to the inquiry, Had the lessors sold the lot before this action was begun? The defendants in their answer make the following allegation: "On or about the first day of March, 1883, the said A. L. Pendleton, Sr., executed a deed for the land in question in this suit, wherein he conveyed an estate to the same to his wife, the said Jane R. Pendleton, for her life, with the remainder as follows: One-third thereof in fee to one Robert Williams; one-third thereof for life to one George Pendleton, and the remaining third to one Kate Pendleton for life, with contingent remainders over." And upon the trial the plaintiff introduced in evidence the deed referred to, and thus fully established the fact that A. L. Pendleton, Sr., one of the lessors, parted with all his interest in the premises at the date of that deed.

The defendants in their answer also allege, as we have said, that the plaintiff holds the life estate of Mrs. Jane R. Pendleton, which she acquired under the aforesaid deed of her husband, to whom it appears the land belonged at the date of the lease to Kramer; and upon the trial the plaintiff established his ownership of that life estate by proving that the tenant for life had conveyed her estate in the premises to a trustee with power of sale, which power had been lawfully exercised, and at the sale so made he had purchased, and the estate of Jane R. Pendleton had been conveyed to him.

Having thus shown that both A. L. Pendleton, Sr., and Jane R. Pendleton had sold the land and no longer had any claim thereto or interest therein, the plaintiff had thereby established that the term of the lease had been determined, for, as we construe the contract, the lease was to terminate whenever such sale was consummated.

We think that the plaintiff, who had thus become the owner of the estate for the life of Jane R. Pendleton, was the proper person to give to the occupants of the lot, the assignees of the original lessee, notice that the lease was ended and that they must take notice of that fact and conform to the terms of the agreement under which they held the premises. He was entitled to the possession of his property—the lot. The defendant had the right at any time within the prescribed period to remove *his* property—the building. In this there was nothing that concerned any right of the remaindermen, and their failure or refusal to join the tenant for life in the giving of the notice cannot affect his rights. He acquired the property, not subject to the provisions of the lease, but fully relieved of them. The plaintiff upon the trial showed that on April 22, 1892, he gave the defendants notice that he had purchased the premises and that the lease was ended, and that the date of his purchase was February 20, 1892. This suit was begun on July 6, 1892. Hence, if we concede that the lease was not to be determined until thirty days after notice of the sale by the lessors, there would still have been a determination of the lease before the beginning of the action. The notice was sufficient. It did not, it is true, specially require the removal of the building. It did distinctly notify them that the plaintiff insisted upon his right to take possession of his land. This was ample notification, we think, that they should remove from the land the fixtures that, under the terms of the lease, they had the right to take away. To hold otherwise would be to stick in the bark.

From what has been said it follows that his Honor erred when he told the jury that "the lease had not been determined." We think that the allegations of the answer and the evidence introduced by the plaintiff and not controverted abundantly established the fact that it had been determined.

We deem it unnecessary to consider the exceptions taken by the plaintiff to evidence introduced by defendants to show that A. L. Pendleton, Jr., one of the defendants, was the assignee of the lessee Kramer. As the case is presented here, it seems to us that the fact that the defendant A. L. Pendleton, Jr. (whose tenant the other defendant was), claimed the land in controversy as assignee of the lease to Kramer was insisted upon by both plaintiff and defendants. Hence, it seems to have been a work of supererogation to prove it, and entirely unnecessary to examine the evidence by which it was sought to establish what each party insisted was true.

The answer contained the following allegation: "In the year 1884 the said Jane R. Pendleton, believing that the sale to her had worked a termination of the lease, instituted a suit against the parties in possession, one T. B. Wilson and one R. W. Berry, for recovery of possession, and the said suit coming on for trial at Fall Term, 1884, the following judgment was made: 'This action having been brought for the possession of a certain tract of land situated in the town of Elizabeth City, bounded as follows, viz., situated on the corner of Main and Water streets, sixteen feet wide on Water street and thirty-nine feet on Main street, it is ordered and adjudged that the defendants have not forfeited the lease in this cause pleaded, and that they are still entitled to the possession under said lease, and that defendants recover costs.' "

Assuming that this judgment was rendered as alleged, it does not in any view, we think, affect the plaintiff's right. It was then properly adjudged, perhaps, that the lease had not been determined, for Mrs. Jane R. Pendleton had not then sold her interest in the leased premises. Since the rendition of that judgment she has done so, and upon that sale the plaintiff founds his right.

New Trial.

E. F. AYDLETT v. ALETHIA NEAL et al.

Messrs. Grandy & Aydlett, for plaintiff (appellant).
Mr. W. J. Griffin, for defendants.

BURWELL, J.: The matters involved in this appeal are substantially the same as those considered by us in the case of *Aydlett* v. *Pendleton*, decided at this term. For the reasons stated in the opinion filed in that cause, there must be a new trial. and it is so ordered.

New Trial.

F. N. MULLEN v. NORFOLK & CAROLINA CANAL COMPANY.

Foreign Corporation—Service of Process—Attachment and Publication—Mailing Process—Action for Unliquidated Damages—Practice.

1. The method of mailing process to the Sheriff of the county and State where a non-resident defendant resides, to be served upon him (as provided by ch. 120, Acts of 1891), is optional and not exclusive of service by publication in cases in which this last is proper.
2. An attachment could not be had in an action for unliquidated damages for injury to realty prior to ch. 77, Acts 1893, since the affidavit to procure an attachment must set forth one of the grounds recited in section 347 of *The Code*.
3. Service of process by publication based on an attachment issued in an action for unliquidated damages is invalid, except in cases specified in *The Code*, §347, and amendatory act, ch. 77, Acts 1893.
4. Where a defendant appears specially to move to dismiss the action and notes an exception to the refusal of his motion, his subsequent appearance to the merits waives no right to have the refusal of his motion to dismiss reviewed on appeal.

ACTION, tried at Fall Term, 1893, of CAMDEN Superior Court, before *Graves, J.*, and a jury, the purpose of the action being to recover damages for injury to crops growing on plaintiff's farms lying upon the sweat or leakage ditches of the defendant company, because of its failure to keep the ditches in proper condition to carry off the water turned into the same and the consequent flooding of the lands. The defendant is a non-resident corporation, and service was made upon it by attaching its property and by subsequent publication of summons. The defendant appeared specially and moved to dismiss the action before *Hoke, J.*, at Fall Term, 1892, which motion the Court refused, and defendant excepted.

The defendant then entered an appearance to the merits and, after trial of the issues before Graves, J., there was an appeal by both parties from various rulings, which it is not necessary to set out, inasmuch as the decision of this Court rests solely on the appeal from the refusal of the motion to dismiss the action.

Mr. W. J. Griffin, for plaintiff.

Messrs. Battle & Mordecai and *W. D. Pruden*, for defendant.

CLARK, J.: It was strenuously argued that the defendant could not be brought into court by attachment and publication because the Act of 1891, ch. 120, had provided, as a substitute therefor, service by mailing the summons "to the Sheriff or other process officer of the county and State where the defendant resides." This, it was contended, was at the time this action was begun the exclusive mode of service upon non-residents, unless it had appeared that service could not be had in that mode. We think that mailing process to the Sheriff of the county and State where the non-resident resides, to be served upon him, was optional and not exclusive of service by attachment and publication in cases in which these last can be had. This is shown by the wording of the Act of 1891 that "it will be sufficient to mail a copy of the summons, etc.," in lieu of publication, and by the provision that this shall be "*added after*" (not substituted for) paragraph (5) of section 218 of *The Code*. The Act of 1893, ch. 79, is not corrective of any error or omission in the Act of 1891, but is a legislative construction declaratory of the meaning of the Act of 1891, a construction which it would have borne though the Act of 1893 had not, out of abundant caution, been passed.

But the attachment is invalid because the action is for unliquidated damages for injury to realty and the attachment was levied prior to ch. 77, Acts 1893. *Price* v. *Cox*, 83 N. C., 261; *Wilson* v. *Manufacturing Co.*, 88 N. C., 5.

It follows that the attempted service by publication, based on such void attachment, is itself invalid. This point has been so clearly discussed by SHEPHERD, J., in *Winfree* v. *Bagley*, 102 N. C., 515, that it would be a work of supererogation to repeat it. The affidavit to procure an attachment must be specific (*Bacon* v. *Johnson*, 110 N. C., 114), and must set forth one of the grounds recited in section 347 of *The Code*. It should be noted that this section differs materially from the statute in force when *Wilson* v. *Manufacturing Co.*, *supra*, was decided. It may be, and is very probable, that the defendant is a domestic as well as a foreign corporation. But in the affidavit, orders and statement of the case it is stated to be a foreign corporation. Hence the question whether, if it is a domestic corporation and its officers are not to be found in this State, it can be brought into court in the manner provided by chapters 108 and 263, Acts of 1889 (Clark's Code, 2d Ed., p. 133), is a question not now before us. Treated as a foreign corporation, the action being for unliquidated damages for injury to realty prior to the Act of 1893, the optional mode of service by attachment and publication is invalid, as would have been in such case mailing process and its service by the Sheriff of the place of residence. *Long* v. *Insurance Co.*, at this term.

The defendant appeared specially below, and moved to dismiss the action. This being denied, the Judge properly held that an appeal did not lie, and that the defendant should have his exception noted, and proceed. This has already been held in this same case, 112 N. C., 109. The subsequent appearance of the defendant to the merits, after exception entered to the refusal of the motion to dismiss, waives none of its rights. On appeal the exception comes up for review. *Luttrell* v. *Martin*, 112 N. C., 593. As the action must be dismissed this disposes of both appeals.

Action Dismissed.

JOHN W. GODWIN v. B. F. EARLY et al.

Petition for Partition, requisites of—Amendment—Practice.

1. While a petition for partition of land is defective which does not set forth that the petitioners are tenants in common and in possession (the general rule being that possession of one tenant in common is the possession of all), yet the omission of such allegation does not deprive the Clerk of jurisdiction, but constitutes simply a defective statement of a cause of action.
2. A Clerk having jurisdiction of a petition for partition, the transfer thereof to term for trial of issues raised by the pleadings transferred the jurisdiction to the Judge, and his denial of a motion for leave to amend the petition upon the ground that he had no power to grant it was error.

SPECIAL PROCEEDING, heard at Fall Term, 1893, of HERTFORD Superior Court, before *Graves, J.*

The case commenced before the Clerk on petition to sell land for partition, and was transferred to term for trial on issues raised by the pleadings. Upon call of the case, the defendants moved to dismiss the petition because it did not allege that plaintiff was in the possession of the common property, and insisted that without such allegation the Clerk had no jurisdiction; and the Court so ruled. Plaintiff excepted.

The plaintiff then moved for leave to amend the petition and allege possession, but the Court refused the motion upon the ground that it did not have the power to grant the amendment so as to cure the jurisdictional defect, and dismissed the petition. The plaintiff excepted and appealed.

Mr. B. B. Winborne, for appellant.
No counsel *contra.*

MACRAE, J.: The special proceeding begun before the Clerk having been transferred to term for trial of issues raised by the pleadings, the Judge had jurisdiction of the same by virtue of chapter 276, Laws 1887. It seems to be now settled by repeated adjudications that the petition is defective unless it sets forth that the petitioners are tenants in common and in possession—the general rule being that possession of one tenant in common is possession of all—where there has been no actual ouster. *Alsbrook* v. *Reid*, 89 N. C., 151; *Wood* v. *Sugg*, 91 N. C., 93; *Osborne* v. *Mull*, *Ibid.*, 203; *McGill* v. *Buie*, 106 N. C., 242.

We think, however, that the failure to allege possession did not deprive the Clerk or the Judge of jurisdiction; it simply constituted a defective statement of a cause of action. *Garrett* v. *Trotter*, 65 N. C., 430.

Of the proceeding for partition the Clerk had jurisdiction, and, by virtue of the statute above, this jurisdiction was transferred to the Judge. When his Honor then denied the motion for leave to amend the petition in this respect, upon the ground of want of power to grant it, there was error.

The reasoning is the same as that upon section 908 of *The Code*, concerning amendment of process or other proceeding begun before a Justice of the Peace. To apply it to the case before us we may use the language of MERRIMON, J., in *Singer Manufacturing Co.* v. *Barrett*, 95 N. C., 36: "The Superior Court cannot create and supply its jurisdiction, but it can amend a process or pleading to make the jurisdiction appear properly when in fact it did exist but did not so appear—thus rendering effectual a large and important class of judicial proceedings that otherwise would very frequently entirely fail, to the injury of individuals and the prejudice of the public." Reversed.

ALFRED SAWYER v. FIRST NATIONAL BANK OF ELIZABETH CITY et al.

Partnership—Community of Interest in Profits and Property—Agreement.

1. A partnership is constituted by an agreement which gives to the parties thereto not only a community in the profits but also in the capital.
2. An agreement between B. and S. set out that B. had employed S. as clerk to superintend B.'s store as long as the latter chose to employ him, S. to have half the net profits, and further declared that S. was a half owner of all the goods, moneys, accounts, notes, etc., belonging to the store: *Held*, that such agreement constituted a partnership, and S., as surviving partner, is entitled to collect the firm's bank balance.

CIVIL ACTION, tried before *Brown, J.*, and a jury, at January, 1894, Special Term of PASQUOTANK Superior Court.

The plaintiff alleged that he was the surviving partner of the firm of T. S. Berry, and sought to recover from the defendant bank the balance due the firm on its deposit. The administrator of T. S. Berry was allowed to become a party defendant, and in his answer denied the alleged partnership, and claimed the bank balance as the property of his intestate.

Upon the trial in apt time defendant tendered the following issue, to-wit: Is O. G. Pritchard, administrator of T. S. Berry, entitled to recover the fund in controversy, or any part thereof? and asked upon this issue to be allowed to open and close the case. This was refused, and defendant excepted.

It was admitted that the fund in controversy had been paid into court by the bank by consent.

The Court submitted the following:

1. Was the paper-writing dated May 30, 1891, purporting to be an agreement between T. S. Berry and A. Sawyer, duly signed and executed by said T. S. Berry?

2. If so, is the plaintiff, as surviving partner, entitled to recover the fund in controversy?

3. If the said plaintiff is not entitled to recover said fund, is the interpleader, O. G. Pritchard, administrator of T. S. Berry, entitled to recover the same?

The plaintiff was allowed to open and conclude the case and assume the burden, and defendant excepted.

The plaintiff, A. Sawyer, was introduced, among others, as a witness in his own behalf. He testified that he knew the handwriting of T. S. Berry, and had seen much of his handwriting for several years.

The paper-writing purporting to be an agreement between witness and T. S. Berry was handed to the witness, and was as follows:

"NORTH CAROLINA—Camden County.

"Agreement is this day entered into between T. S. Berry of the one part and Alfred Sawyer, Jr., of the other part, both of the county of Camden and State of North Carolina, as follows, to-wit: The said T. S. Berry is now selling goods at Belleross and has employed the said Alfred Sawyer, Jr., as a clerk to superintend the said store as long as the said Berry chooses to employ him, and the said Sawyer is to have for his services one-half ($\frac{1}{2}$) of all the profits the said store makes after paying all expenses of the said store; and further, the said Sawyer is to-day one-half ($\frac{1}{2}$) owner of all the goods, moneys, accounts, notes, etc., that belong to the store; and further, the said Berry is not to make any charges as rent for said store, warehouse, or dwelling-house where the said Sawyer now lives, for this and his daily service is his compensation is equal division of profits with the said Berry. Witness our hands and seals, this May 30, 1891.

"(Signed) T. S. BERRY, [Seal.]
"(Signed) A. SAWYER, [Seal.]"

The witness was asked, "In whose handwriting is the body of said paper?" He replied, "In the handwriting of T. S. Berry." He was then asked, "In whose handwriting is the signature T. S. Berry appearing on said paper?" He replied, "In the handwriting of T. S. Berry." He was then asked, "In whose handwriting is the signature A. Sawyer appearing thereon?" He replied, "In my handwriting."

To each of said questions and to each answer the defendant in apt time objected, and excepted to their admission.

There was other evidence offered tending to prove and to disprove that said paper-writing was in T. S. Berry's handwriting. There was also other evidence tending to prove that the fund in controversy was deposited in bank by A. Sawyer to the credit of "T. S. Berry," and that it was money derived from the store business and sales of goods. There having been no exception to this evidence, it is not set out.

The Court, among other matters, instructed the jury as follows:

1. That if they believed that the signature of T. S. Berry to the agreement introduced is in the proper handwriting of T. S. Berry, and that T. S. Berry signed and executed said agreement, they should answer first issue, Yes.

2. That if said paper-writing was duly executed upon the part of T. S. Berry and A. Sawyer it constituted them copartners as to the matters, business and property therein set out.

To this charge the defendant Pritchard excepted.

The jury responded "Yes" to the first and second issues and "No" to the third. There was judgment for the plaintiff, and defendant Pritchard, administrator, appealed.

Messrs. Grandy & Aydlett, for plaintiff.
Mr. W. J. Griffin, for defendant Pritchard (appellant).

SHEPHERD, C. J.: We think his Honor was correct in holding that on the face of the contract a copartnership existed between the plaintiff and T. S. Berry, deceased. Tested by our old cases, it is very clear that the absence of any personal liability on the part of Berry to the plaintiff for compensation for his services and the presence of a right to demand an account in order to ascertain his half of the profits (which half interest is directly conferred upon him by the contract) would constitute a copartnership. *Cox* v. *Delano*, 3 Dev. Eq., 89; *Holt* v. *Kernodle*, 1 Ired., 199. Whether there should be any modification of the rule as to making the sharing in the profits an absolute test of copartnership in all cases (see *Fertilizer Co.* v. *Reams*, 105 N. C., 283) is a question that does not arise on this appeal, as we have here not only a community in the profits but also a community in the capital. In this class of cases, says Mr. Bates, "the conclusion is irresistible that there is a communion of interests in the profits and not a portion of them as compensation, for each has as much right as the other, and hence that a partnership results." Bates' Law of Partnership, sections 31 and 32.

Apart from any holding out, we think that under our decisions the creditors of the firm could have recovered of the plaintiff, and, if this be so, it must follow that he is entitled to the assets as surviving partner.

We have examined the other exceptions, although they were not very strenuously pressed on the argument. They are without merit. Affirmed.

L. C. LASSITER et al. v. CALEB ROPER et al.

Pleading—Statute of Limitations, defective plea of.

1. Under *The Code*, as well as at common law, the facts constituting a cause of action or defence must be plainly set forth in the pleading.
2. A plea of the statute of limitations which contains no facts whatever, and which refers to no facts in the other parts of the pleading which lend any aid to the plea and from which any legal conclusions can be deduced, is defective.

CIVIL ACTION, tried at January Special Term, 1894, of PASQUOTANK Superior Court, before *Brown, J.*, and a jury.

The action was against the defendant Caleb Roper, administrator of H. E. Lassiter, and the other defendants as his sureties, for a breach of the administration bond.

The defendants in their answer, after denying the allegations of the complaint as to the breach of the bond, alleged as follows:

"That since the final account and settlement of said estate and the institution of this suit the time elapsed is sufficient in law to bar a recovery against these defendants or either of them, and they and each one of them pleads the statute of limitations in bar of plaintiffs' recovery in this action."

The following issues were submitted to the jury:

"1. Is defendant Roper, as administrator of H. E. Lassiter, indebted to plaintiffs, and if so, in what sum?

"2. Is the cause of action as to said Caleb Roper barred by the statute of limitations?

"3. Is the cause of action as to said defendants, Henry Roper and T. D. Pendleton, sureties on the administration bond, barred by the statute of limitations?"

The plaintiffs objected to issues two and three, relating to the statute of limitations, upon the ground that they were not relevant and proper under the pleadings.

The defendants asked to amend their answer so as to plead the statute of limitations if it was not already properly pleaded. This the Court refused, and defendants excepted.

The Court submitted the issues objected to, but reserved the right to set aside the verdict as to these and strike out the issues if he should hold with the plaintiffs.

The jury responded to the first issue, "Seventy-nine dollars and sixty cents and interest from February 3, 1884." To the second "No," and to the third "Yes."

The Court, before judgment was signed, set aside the verdict as to the issues objected to and withdrew them; to which defendants excepted, and upon judgment being rendered against all the defendants the defendants excepted and appealed.

Messrs. Grandy & Aydlett, for defendants (appellants).
No counsel *contra*.

SHEPHERD, C. J.: In *Bayard* v. *Malcolm*, a case reported in 1 Johnson, 453, Chief Justice KENT remarked: "I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." It was but in keeping with the spirit of these views that our present system of civil procedure was framed and enacted, and we find this Court very shortly after its adoption repudiating the idea that loose and uncertain pleading would be tolerated.

In *Crump* v. *Mims*, 64 N. C., 767, the Court said: "We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by *The Code.*" In *Parsley* v. *Nicholson*, 65 N. C., 210, it was said: "The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form." In *Oates* v. *Gray*, 66 N. C., 442, it was said that the object of *The Code* was "to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice." After other decisions to the same effect it again became necessary, as it now is, to emphasize these early declarations of the Court, and it was therefore remarked in *Vass* v. *Building and Loan Association*, 91 N. C., 55, that "It was a false notion entertained by some of the legal profession that the Code of Civil Procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld; on the contrary, while it is not perfect, it has both logical order, precision and certainty, when it is properly observed. Bad practice, too often tolerated and encouraged by the Courts, brings about confusion and unjust complaints against it." It is hardly necessary to say that it was one of the elementary principles of the common law pleading that "*facts* only are to be stated and not arguments or inferences or matters of law" (1 Chitty Pl., 214), and that it is still essential to state the facts (which, indeed, is the chief office of pleading) is apparent from the explicit language of *The Code,* §§233-243, which provides that "there must be a plain, concise statement of the facts constituting a cause of action," and the same rule of course applies to a defence set up in the answer. *Rountree* v. *Robinson*, 98 N. C., 107.

In accordance with the foregoing principles the Court held that a complaint "which merely states a conclusion of law (that is, that the defendant is indebted to the plaintiff, and that the debt has not been paid) is demurrable both at common law and under *The Code*." *Moore* v. *Hobbs*, 79 N. C., 535. So in *Rountree* v. *Robinson*, *supra*, in which the defendant pleaded that "the bond was executed by this defendant to the said R. H. Rountree for an illegal and usurious consideration," it was held that the plea was bad because it did not set forth the facts constituting the defence of usury. In *Pope* v. *Andrews*, 90 N. C., 401, the plea that "the plaintiff's alleged cause of action is barred by the statute of limitations" was held bad. The Court said: "We have before adverted to this insufficient manner of setting up the effect of the lapse of time as an impediment to the suit. This averment that the demand is barred by the statute is but stating a conclusion of law, and not the facts from which it is deduced. This is neither in conformity to the former nor the present mode of pleading the defence." In *Humble* v. *Mebane*, 89 N. C., 410, the plea of the statute of limitations was held to be defective, "in that it failed to state when the cause of action accrued, and when the wards arrived at full age." See also, *Love* v. *Ingram*, 104 N. C., 600. In *Turner* v. *Shuffler*, 108 N. C., 642, the language of the answer was that the defendants "plead the statute of limitations of ten, seven, six and three years as prescribed in *The Code* to all said claims, and aver that they are unable to plead the same more definitely to each and all of said claims." This was held defective. The Court said: "This is clearly bad and insufficient pleading. The Court might, in its discretion, have allowed appropriate amendments, but it was not bound to do so, nor is the exercise of its discretion reversible here." In the case of *Pemberton* v. *Simmons*, 100 N. C., 316, cited by counsel for defendant, the defence was the presumption of payment under the Revised Code, ch. 65, and the defective plea seems to have been aided by a reference to "the whole of the pleadings." Whatever may be the true ground of the judgment, it cannot be considered as an authority against the principles laid down in the unbroken line of decisions to which we have referred, and especially in view of the more recent decision of *Turner* v. *Shuffler, supra.*

It must be manifest that according to the above authorities the plea in the present case is fatally defective. The plea is as follows: "That since the final account and settlement of said estate and the institution of this suit the time elapsed is sufficient in law to bar a recovery against these defendants or either of them, and they and each of them pleads the statute of limitations in bar of plaintiff's recovery in this action." This simply amounts to the plea in *Pope* v. *Andrews, supra,* which was held to be defective. It contains no facts whatever, but is a simple allegation of law, and nothing more. There are no facts in the other parts of the answer which lend any aid to the plea, and from which any legal conclusions can be deduced. Indeed, it is remarkable that there is but one date in the entire pleading, and that is simply as to the death of the intestate. It would introduce inestimable uncertainty and confusion and bring merited reproach upon our present method of procedure were we to uphold the plea in this case. It is a very simple requirement of *The Code,* as well as the common law, that the facts constituting a cause of action or defence shall be plainly set forth. This has not been done by the defendants, and we are therefore of the opinion that the ruling of his Honor must be

Affirmed.

MOSES WEISEL v. GEORGE COBB, Assignee.

Surviving Partner, assignment by—Duty of Assignee—Trust—Action for Accounting Against Assignee.

1. Upon the death of one partner the law vests the title to the partnership assets in the survivor in trust to pay the firm debts and divide the remainder between himself and the administrator of the deceased partner.
2. Where a surviving partner of a firm conveyed to "C., administrator" of the deceased partner, the assets of the firm to enable the said "C., administrator, to pay off all the debts and liabilities of the deceased partner, including the debts of the said firm, and to legally account for all such moneys as may come into his hands by virtue of this assignment": *Held*, that the assignor (the surviving partner) is entitled to bring suit against C. individually for an accounting of his trusteeship.

Civil action, heard before *Brown, J.*, at January Special Term, 1894, of Pasquotank Superior Court.

The purpose of the action was to obtain an accounting by the defendant of his trusteeship under a deed of assignment made by Moses Weisel, the plaintiff, surviving partner of the firm of S. Weisel & Son. The assignment was as follows:

"Whereas, the late firm of S. Weisel & Son had pecuniary liabilities; and whereas, George W. Cobb has administered upon the estate of Samuel Weisel, deceased, who was senior member of said firm, now therefore, in order to enable the said Cobb, administrator, to pay off all the debts and liabilities of the said Samuel Weisel, including the debts of the said firm, I, Moses Weisel, the sole surviving partner of the said firm, for one dollar to me in hand paid by said Cobb (the receipt of which is hereby acknowledged), do hereby transfer and assign to said Cobb, administrator, all the stock of goods, all notes and accounts and choses in action, and all other personal property of said firm, and I do hereby vest with him full power to bring suit in his name as administrator aforesaid upon all notes and accounts, and to collect the same, and to legally account for all such moneys as may come into his hands by virtue of this assignment.

"Witness my hand and seal, this the sixteenth day of June, 1886. MOSES WEISEL, [Seal.]

"*Surviving partner of S. Weisel & Son.*"

The complaint was as follows:

"1. That the plaintiff and S. Weisel were merchants in Elizabeth City, N. C., and partners doing business under the firm name of 'S. Weisel & Son.'

"2. That during the continuance of said firm S. Weisel died during the year 1886, and left this plaintiff surviving partner.

"3. That shortly after the death of S. Weisel the defendant, G. W. Cobb, administered on his estate.

"4. That on the 16th day of June, 1886, this plaintiff, as surviving partner of the firm of S. Weisel & Son, made assignment to G. W. Cobb, administrator of S. Weisel, of all of the stock of goods, all notes and accounts and choses in action, and all other personal property of said firm, and to sue for and collect all notes and accounts, and to legally account for all amounts and moneys so collected and received by virtue of said assignment.

"5. That said G. W. Cobb, by virtue of said assignment, took charge of all of the goods, merchandise, notes and accounts, choses in action, and all other personal property belonging to the said firm, of the value of thirty-three thousand dollars, or some other large sum, and converted same to his use.

"6. That by virtue and force of said assignment defendant Cobb was required to legally account for and settle with this plaintiff for all of the property, goods, merchandise, notes and accounts, etc., that went into his hands belonging to the said firm of S. Weisel & Son.

"7. The plaintiff has demanded a settlement and account of defendant, showing his management and disposition of said property belonging to said firm, and to him as surviving partner of same, with all of which fair, reasonable and just request and demand defendant has refused to comply.

"8. That this defendant is indebted to plaintiff in the sum of two thousand dollars, or some other large sum, on account of money received belonging to said firm, his management and conversion of the property herein set out, for which he refuses to account and settle.

"Wherefore, plaintiff demands judgment against defendant for the sum of two thousand dollars; that an account may be taken, showing amount of property received by defendant, value of same, amounts paid out under the assignment, also amount remaining in the hands of defendant due the plaintiff, and for such other and further relief as the nature and circumstances of the case may require, and for costs."

At September Term, 1892, the cause was, by consent, referred to W. J. Griffin, Esq., and upon the coming in of the report many exceptions were filed, and his Honor being of opinion "that the action cannot be maintained against George W. Cobb individually, but that he must be sued as administrator, and his liability adjusted according to the law as applicable to an administrator," granted defendant's motion to dismiss the action, and plaintiff appealed.

Messrs. Grandy & Aydlett, for plaintiff (appellant).

No counsel *contra*.

BURWELL, J.: The plaintiff, being the survivor of the firm of S. Weisel & Son, succeeded by right of such survivorship to all the assets of the partnership upon the death of his partner. They were vested in him as trustee, first, to pay out of them all the debts of the firm; and secondly, to divide between himself and the administrator of his deceased partner what should remain after the payment of the firm debts according to the terms of the copartnership. The law gave him the title to all these assets, but along with it put upon him the burden of the trust. By the assignment set out in the record he stripped himself, so far as he could, of this title, and put it in the defendant (who had been appointed to administer the estate of the deceased partner), "to enable the said Cobb, administrator, to pay off all the debts and liabilities of the said Samuel Weisel, including the debts of the said firm." The plaintiff could not thus, or indeed in any way, escape his liability to the partnership creditors. That liability remained upon him notwithstanding the assignment. And his right to a share of what remained after the payment of the partnership debts was unaffected, for, far from surrendering his personal interest in the assets, as we construe the assignment, he expressly imposed upon the assignee, whom he thus substituted for himself to administer the trust, the duty "to *legally* account for all such moneys as may come into his hands by virtue of this assignment"; that is to say, to administer these partnership assets just as he would administer them under the law if the assignment had not been made. For two reasons, therefore, the plaintiff could call for an account of the management of these assets: to ascertain if the firm debts had been paid, and, if not, to have that done; and to ascertain if any sum was due to himself, and if so to receive its payment. He therefore, most unquestionably, had a good cause of action against the assignee to whose care he had committed the valuable partnership assets.

If it should appear on the taking of the account that the debts of the firm had all been paid and that the balance remaining after such payment had been applied as plaintiff had expressly or impliedly agreed that it should be, there would be a judgment against him for costs, and the whole matter would be finally settled.

The plaintiff, being thus circumstanced, sued "George W. Cobb," and alleged among other things that the value of the assets was "thirty-three thousand dollars or some other large sum," and that "G. W. Cobb by virtue of said assignment" took charge "of said assets and converted same to his use." The record shows that *by consent* there was a reference to state an account. The referee heard the cause and made a report, and, upon the hearing of the case upon exceptions to that report, "G. W. Cobb" made a motion to dismiss the cause for the reason that the assignment spoken of was made to "G. W. Cobb, administrator," and upon this motion the action was dismissed.

The facts set out in the complaint constituted a good cause of action in favor of the plaintiff against the defendant. If upon the taking of the account it shall be found that on a proper settlement of the partnership business there was a balance left after the payment of all the liabilities of the firm, the question will arise, Was the plaintiff entitled to any part of this balance under the terms of the copartnership? And if that be answered in the affirmative, the question will arise, Did the plaintiff expressly or impliedly agree that the defendant should apply the balance so due him to the payment of the individual liabilities of Samuel Weisel? And should this also be answered in the affirmative, there would arise the further question, Has the defendant used that fund in the prescribed way? About this last question the plaintiff had a right to inquire. He is the trustor. It is his privilege to demand of the trustee an account. As we have said, the plaintiff, as surviving partner, was invested with the title to all the partnership assets as a trustee. He transferred that trust to "George W. Cobb, administrator." The duty of winding up the affairs of S. Weisel & Son, there being a surviving partner, was not imposed by law on the administrator of Samuel Weisel. He received these valuable assets, not as administrator, we think, but the title to them was put in him because he was such administrator. At any rate he took them in some capacity and for some purpose from the plaintiff, who by this action demands an account of his trusteeship. He is, we think, clearly entitled to it. If "George W. Cobb, administrator," has applied those assets as they were legally and properly applicable, all well. That will protect "George W. Cobb." If either "George W. Cobb" or "George W. Cobb, administrator," has misapplied them, it is not well, and "George W. Cobb" must answer for the breach. The action should not have been dismissed.

Error.

JOHN F. DAVIS v. HARVEY TERRY et al.

Specific Performance of Contract—Repudiation, what is not—Pleading—Counter-claim.

1. Where a contract for the purchase and sale of land provided that the survey should be made at the joint expense of the parties and a tender of a deed was made accompanied by a demand for the payment of one-half of what the purchaser claimed and which was afterwards adjudged to be exorbitant, the refusal of the purchaser to pay such exorbitant charge cannot work a forfeiture of his right to a conveyance, he having complied with the terms of the contract.

2. Where A contracted to convey lands to B, who paid the purchase-money therefor, and B afterwards brought suit to have the written contract reformed so as to include more land which he alleged A verbally agreed to convey, such suit, though unsuccessful, was not a repudiation by B of the written contract, and cannot have the effect of depriving him of his right to a specific performance of the same.
3. Although a counter-claim set up in an answer and admitted therein to be the subject of another action pending between the parties will be abated upon the objection of the plaintiff by a proper pleading, yet such objection, if waived, cannot afterward avail the plaintiff.
4. A counter-claim for damages for the malicious prosecution of a prior action which fails to allege facts showing that the prosecution of such prior action was without probable cause, is bad.

CIVIL ACTION, tried before *Brown, J.*, and a jury, at a Special Term of PASQUOTANK Superior Court.

There was judgment for plaintiff, and defendant appealed. The facts are sufficiently stated in the opinion of Chief Justice SHEPHERD. (See also, *Davis* v. *Ely*, 104 N. C., 16, and *Ely* v. *Davis*, 111 N. C., 24).

Mr. W. J. Griffin, for plaintiff.

Mr. Harvey Terry, for defendants (appellants).

SHEPHERD, C. J.: This is an action for the specific performance of a contract to convey a certain part of what is called the "Great Park Estate." Under the terms of the contract the defendants Ely and wife through their attorney in fact, Terry, covenanted, in consideration of the sum of five thousand dollars (which has been paid by the plaintiff), to convey to the plaintiff one-half of said real estate, to be ascertained by a survey, running a line nearly north and south, the said survey to be made at the joint expense of the parties. The defendants in the same agreement also covenanted to convey to the plaintiff thirteen hundred acres of land adjoining the "Great Park Estate," which we may designate as the Hall tract. The survey was made by one Cassall and a deed was prepared containing one-half of the said estate according to the survey and also including thirteen hundred acres of adjoining land according to the contract as it was written. This deed was tendered to the plaintiff upon the condition that he pay to the said Terry the sum of seven hundred dollars, which was stated to be one-half of the expenses of the survey. The plaintiff refused to pay this amount on the ground that the charge was excessive, being more than one-half of the said expenses, and his contention was sustained in an action brought against him for the said amount, the recovery being only for the sum of four hundred dollars. This amount was paid by the plaintiff and he has been in possession of the estate for many years. Since that time he has demanded a conveyance according to the survey and the terms of the contract, but the defendants have refused and now refuse to execute the same.

Very clearly the plaintiff did not forfeit his rights under the contract because of his refusal to pay the excessive charges of the defendants, and the only ground upon which a specific performance is resisted is based upon a supposed repudiation of the contract by the plaintiff. This is a total misapprehension on the part of the defendants, as the action brought by the plaintiff (upon which the defendants rely as sustaining their defence) was not for the purpose of rescinding the contract, but for its correction by including all of the Hall tract and enforcing the contract with the variation as corrected. The plaintiff alleged that he was induced to enter into the contract by reason of the false and fraudulent representations of the defendant Terry, the agent of the defendants, as to the quantity of land embraced in the

Hall tract. The testimony tending to establish the alleged fraud was properly excluded by the Court on the ground that the plaintiff expressly disclaimed any purpose to rescind the contract, and that it would be in contravention of the spirit and policy of the statute of frauds to correct the contract by adding additional land upon verbal testimony alone. The ruling of the Court was affirmed upon appeal (*Davis* v. *Ely*, 104 N. C., 16), but we explicitly declared that the plaintiff could enforce the performance of the contract in its present form, and this is precisely what he is seeking to do in this action.

We are wholly at a loss to understand why the plaintiff is not entitled to the relief prayed for, as it is not pretended that he is barred by the statute of limitations, or that he has been guilty of such laches as will stay the hand of a court of equity. The motion for nonsuit, therefore, simply on the ground that the plaintiff had brought the said action to correct the contract, was properly overruled. This being determined, there is nothing in the other objections to a decree for specific performance, as the issues were submitted without objection and found against the defendants without a single exception, either to the rejection or admission of testimony or the charge of his Honor. According to these findings the plaintiff has complied with all of the terms of the contract, and is "the equitable owner of that part of the 'Great Park Estate' set out in the complaint, and entitled to a conveyance therefor from the defendants Ely and wife." The exception to the judgment upon such findings is manifestly untenable.

The other exceptions are addressed to the rulings upon the counter-claim of the defendants. As it is admitted in the answer that the facts set forth in the counter-claim are the subject of another action now pending in the Courts of this State, the counter-claim would have been abated had the objection been insisted upon by proper pleading. This seems to have been waived, and cannot now avail the plaintiff. *Hawkins* v. *Hughes*, 87 N. C., 115. The other objections, however, were properly raised and in apt time. In an action brought by the defendants against the plaintiff upon substantially the same allegation it was decided by this Court, upon demurrer *ore tenus*, that the complaint did not set forth facts sufficient to constitute a cause of action, in that it failed to allege or set forth facts showing that the prosecution of the suit by the plaintiff against the defendants to reform the deed, etc. (which was the basis of the action), was without probable cause. The Court said that "this omission was in itself fatal to plaintiff's action." *Ely* v. *Davis*, 111 N. C., 24. As this disposes of the counter-claim, it is unnecessary to consider the other exceptions relating thereto. We are of the opinion that there was no error, and the judgment must therefore be Affirmed.

HARVEY TERRY AND TIMOTHY ELY v. JOHN F. DAVIS et al.

Action for Damages—Malicious Prosecution, what constitutes.

An action will not lie for malicious prosecution, in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law or their equivalent in equity, or other circumstances of special damage.

CIVIL ACTION, heard, on demurrer to the complaint, before *Brown, J.*, at January, 1894, Special Term of PASQUOTANK Superior Court.

The facts are substantially the same as reported in the case of *Ely* v. *Davis*, 111 N. C., 24. The defendants demurred to the complaint as follows:

"That the complaint does not state facts sufficient to constitute a cause of action, for the reason that it does not allege that there was an arrest of the *person* of either of the plaintiffs or seizure of their property in any proceeding at law, or their equivalent in equity, or that there was any special damage resulting from the action, and which would not necessarily result in all cases of the like kind."

His Honor sustained the demurrer, and plaintiffs appealed.

Mr. Harvey Terry, for plaintiffs (appellants).

Mr. W. J. Griffin, for defendants.

MACRAE, J.: This is substantially the same action which is reported under the caption of *Timothy Ely* v. *John F. Davis*, in 111 N. C., 24, being an action to recover damages for malicious prosecution. We then sustained the demurrer upon the ground that there was no allegation in the complaint of want of probable cause, nor statement of facts which, if proved, would establish the want of probable cause in the alleged malicious charge of fraud and false representation.

We proceeded further to intimate, in order that the plaintiffs might understand that this litigation ought to cease, our opinion that an action will not lie for malicious prosecution in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law, or their equivalent in equity, or in proceedings in bankruptcy or like cases where 'there was some special damage resulting from the action and which would not necessarily result in all cases of the like kind. We affirmed the judgment below dismissing the action. The plaintiffs seem to have immediately begun an action against the same defendants or their personal representatives. It is here again upon substantially the same complaint, with the addition of the allegation of want of probable cause. We have listened with attention to the argument of counsel and have examined the authorities presented by him, and are still of the opinion that the action will not lie, for the reasons fully stated in the opinion above referred to and which we deem unnecessary to repeat. We need not, therefore, examine the other grounds of demurrer. The judgment of his Honor below sustaining the demurrer and dismissing the action is Affirmed.

R. J. DUNNING et al. v. W. D. BURDEN AND WIFE et al.

Devise—Construction of Will—Conditional Limitation.

A testator devised a life estate in a part of his lands to his wife, with remainder to the two children of a deceased son, provided that if said children should die "leaving no lawful heir (either or both of them) of their own body" the remainder should go to the children of another son and daughter of the testator. The children of the second son and daughter were provided for in another part of the will: *Held*, that the testator intended the share of his realty, set apart to the two children of the first son, as a provision, primarily, for each of them at all events during their lives, and in case both should leave issue them surviving, then to vest a moiety in the issue of each, but if only one should die leaving a child or children such surviving issue to take the whole.

CLARK, J., dissenting.

This was a CIVIL ACTION, tried at Special Term, November, 1893, of BERTIE Superior Court, before *Bynum, J.*, a jury trial having been expressly waived, upon an agreed statement of facts, which were substantially as follows:

That Parker Harmon died intestate in Bertie county on the 4th day of July, 1877, aged eighty-two years, seized and possessed of the land described in the complaint, which is a part of the land mentioned as the home plantation in "Items 1st and 2d" of the last will and testament of the said Parker Harmon; that Parker Harmon left him surviving the following children, viz.: Abram T. Harmon and Sarah Dunning, and Ella and Walter Harmon, children of Moses R. Harmon (Moses Harmon being a son of said Parker); that the material parts of his will were as follows:

"*Item 1st.* I lend to my beloved wife, Cilvia Harmon, the lands and plantation whereon I now reside, including my mansion house and all other houses thereunto belonging, together with all the household and kitchen furniture of every kind, also one horse, one ox and five head of other cattle, two sows and pigs, two ewes and lambs, her choice of all of said stock, also one year's provisions, if on hand, or out of the growing crop, as the case may be, to her, my beloved wife, Cilvia Harmon, during her natural life.

"*Item 2d.* After the death of my beloved wife, Cilvia Harmon, I give and bequeath the said lands and plantation whereon I now reside to the children of my deceased son, Moses R. Harmon, to them and their lawful heirs forever: provided, however, if the said Ella C. Harmon and Walter M. P. Harmon should depart this life, leaving no lawful heir (either or each of them) of their own body, I give and bequeath the said lands and plantation above named to the children of my son, Abram T. Harmon, and the children of my daughter, Sarah Dunning, wife of Andrew J. Dunning, to them severally and their heirs forever.

"*Item 3d.* My other lands of which I am seized and possessed, known as the Nicholas Harmon tract and Outlaw tract, I desire to be sold by my executors (if not disposed of during my life) and the net proceeds arising therefrom I give and bequeath to my son Abram T. Harmon's children and my daughter Sarah Dunning's children (wife of Andrew J. Dunning), to them severally and their heirs forever.

"*Item 4th.* After the death of my beloved wife, Cilvia Harmon, I desire that all my property of every kind and description, whether real or personal, shall be sold by my executor and the net proceeds arising therefrom I give and bequeath to my son Abram T. Harmon's children and my daughter Sarah Dunning's children (wife of Andrew J. Dunning), to them severally and their heirs forever."

That Walter M. P. Harmon and Ella C. Burden, formerly Ella C. Harmon, are the children and only heirs at law of Moses R. Harmon, son of Parker Harmon; that Walter M. P. Harmon died on the 22d day of May, 1887, without ever having been married and without ever having had issue born unto him; that the plaintiffs are the children of Abram T. Harmon and the children of Sarah Dunning, which are mentioned in section or item two of the will and testament of Parker Harmon. The infant plaintiff Williford is the grandchild of Sarah Dunning and represents his deceased mother; that the defendants are Ella C. Burden, formerly Ella C. Harmon, she having intermarried with the defendant W. D. Burden, and her said husband is joined as a party defendant; that said Ella Burden had a child born alive by said marriage and has now seven children living; that Cilvia Harmon, widow of Parker Harmon, died on the 12th day of July, 1878.

Upon this state of facts his Honor gave judgment for the plaintiffs, and defendants appealed.

Mr. St. Leon Scull, for plaintiffs.

Messrs. F. D. Winston and *Peebles & Martin*, for defendants (appellants).

AVERY, J.: Our attention is called, for the purpose of construing the devise of the home place after the death of the testator's wife and especially the contingent limitation over to the children of his son Abram and his daughter Sarah, to the second item of the will, which provides as follows: "After the death of my beloved wife, Cilvia Harmon, I give and bequeath the said lands and plantation whereon I now reside to the children of my deceased son, Moses R. Harmon, to them and their lawful heirs forever: provided, however, if the said Ella C. Harmon and Walter M. P. Harmon should depart this life leaving no lawful heir (either or each of them) of their own body, I give and bequeath the said lands and plantation above named to the children of my son, Abram T. Harmon, and the children of my daughter, Sarah Dunning, wife of Andrew J. Dunning, to them severally and their heirs forever."

We think that the language is clearly susceptible of the interpretation that the testator intended the share of his realty, set apart to the two children of his son Moses, as a provision primarily for each of them at all events during their lives, and, in case both should leave issue them surviving, then to vest a moiety in the issue of each, but if only one should die leaving a child or children, that such surviving issue would take the whole. If the words in parenthesis, "either or each of them," had followed the name of Walter Harmon or the word "life," the meaning would manifestly have been that if either should die without lawful issue the limitation over should take effect immediately, and the survivor, though blessed with numerous offspring, should forfeit forthwith his or her interest for life and abandon all claim to the executory devise for such childen, because of the barrenness or celibacy of the other. Such an arrangement of the words would have impelled us to adopt the construction contended for by the plaintiff. However unnatural or unreasonable the purpose to make his bounty to one branch of his family depend upon such a contingency might have seemed, we would have been controlled by the unmistakable meaning of the language used. But the purpose of the testator, apparent from a fair construction of his words, was that if either or each (in the sense of both) should leave surviving them issue ("lawful heirs of their own body") then the limitation over to the children of Abram Harmon aad Sarah Dunning would be defeated, and the fee would vest an undivided moiety in the issue of each, if both should leave issue surviving them or if only one should leave a child or children snrviving them, then the whole in such issue. By this interpretation we not only give to the language employed its natural and obvious meaning, but we arrive at an interpretation consistent with the purpose on the part of the testator, which the law imputes to him in all cases, where the words used are ambiguous, to provide equally for those who are nearest to him, and especially for his lineal descendants. Schouler on Wills, sec. 479 *et scq.* Looking to the whole of the will to determine whether we can discover any general intent or leading purpose which is either in harmony with or repugnant to the interpretation we have given to the clause in question, we find that in the two succeeding paragraphs the testator provides for the plaintiffs, children of his daughter, Sarah Dunning, and of his son, Abram Harmon, by a sale of two tracts of land named and of all other property, real and personal, not specifically devised, and a division of the proceeds of such sales between the children representing the two. The leading purpose of the testator seemed to be to make his grandchildren, issue of his three children, the objects of his bounty. If either or both of the children of Moses should leave issue it seemed to be his wish that they should represent Moses, just as though they were inheriting the land devised by the great-grandfather, from the grandfather, *per stirpes.*

To make the issue of Ella forfeit all claim to a share in the ancestor's bounty, because Walter failed to leave lawful issue, neither harmonizes with the terms of the particular item which gives rise to the controversy nor is in accord with the purpose pervading the whole will. The evident intention of the testator was to do what the parental instinct would naturally prompt him to do—provide by any limitation not too remote for the lawful lineal heirs of either or both of the two children of Moses, but if (by a second marriage of their mother, for instance) there should be *in esse* at the time of the death of either or both, without lawful issue, any person not a descendant of the testator who might inherit from such descendant, then, in that event, it was the testator's purpose that the land should certainly vest in the surviving brother or sister and the issue of such survivor, or, on failure of issue, should be limited over to the other lineal descendants of the testator, the children of Abram and Sarah, rather than pass by inheritance or devise to some person not of his blood.

Entertaining the view that we do, we think that none of the authorities cited, either to sustain the contention that the fee would vest on the death of the testator's wife or of his grandson Walter, have any bearing upon the question of interpretation, which gives rise to the controversy as to the title of the "home place." There is no such analogy to any of those cases as would make them controlling authorities in our interpretation of the will now before us. The contingency in which the plaintiffs would become the owners and entitled to the possession of this land has not arisen and will not arise unless Mrs. Ella Burden should die without issue surviving her—an event altogether possible but not now probable.

There being nothing in the will which discloses a general intent inconsistent with the particular intent expressed in item second, and the particular intent being in accord with the natural feeling which, as a rule, governs a testator in disposing of his property, we think that the judgment should be reversed. Judgment must be entered below on the case agreed for the defendants for costs. Reversed.

CLARK, J., dissenting: The clause is inartificially drawn, but it would seem that the plain meaning of the testator is this: He gave the property to Ella and Walter, the children of his deceased son, Moses, and their heirs, with a defeasance that if either should die without heirs of the body that share should go over to the parties named, and if each of them should die without heirs of the body then the whole should go over. The defeasance with remainder over applied to "either" of them who should die without heirs of the body, and to "each of them" if both should die without heirs of the body. I think the result below was correct.

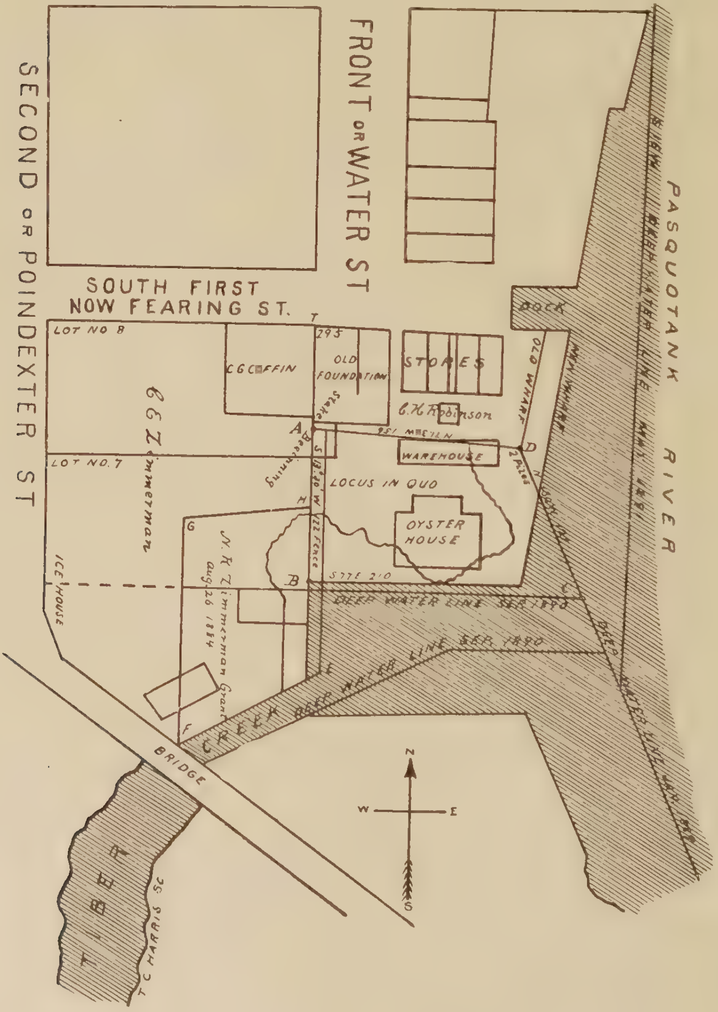
N. R. ZIMMERMAN AND WIFE v. C. H. ROBINSON.

Riparian Rights—Married Woman—Estoppel by Deed.

1. Riparian rights being incident to land abutting on navigable water cannot be conveyed without a conveyance of such land, and lands covered by navigable water are subject to entry only by the owner of the land abutting thereon.
2. Since a *feme covert* may, with the consent of her husband, convey her land "as if she were single," a conveyance by her estops her from afterward acquiring by grant from the State riparian rights incident to the land conveyed, and even if she subsequently entered under another title lapping upon the boundaries of her own conveyance it was necessary in order to effect a disseizin that she should occupy the interference and to mature title that the occupation should continue seven years.
3. Any deed made to her subsequently would feed the estoppel, and she could only have availed herself of it by actual occupation of the land previously conveyed.

CIVIL ACTION for the recovery of land, tried before *Graves, J.*, and a jury, at Fall Term, 1893, of PASQUOTANK Superior Court.

The plaintiffs and defendant claimed from a common source, William Messenger, who owned in 1856 lots No. 7 and 8, and that part east thereof bounded on the north by Fearing street, east by Pasquotank river, south by Pasquotank river and Tiber creek, and west by line represented on plat as "T" "A" "B." The plat introduced was as follows:



Plaintiffs introduced deed from William Messenger to Benjamin Spruill conveying said described property November 30, 1856, and mesne conveyances to *feme* plaintiff, C. E. Zimmerman, for same.

The plaintiff then introduced deeds from Benjamin Spruill and through mesne purchasers to *feme* plaintiff for lots 7 and 8, bounded on the north by Fearing street, east by line T A B, south by Tiber creek, and west by Poindexter street.

It was admitted defendant owned and was in possession of the parcel of land on the plat east of lots 7 and 8, bounded by Fearing street on the north, east by Pasquotank river, south by Pasquotank river and Tiber creek, and west by line T A B, and owns it under deed from plaintiffs, N. R. and C. E. Zimmerman, which deed was introduced, and made a part of this case. The plaintiffs then introduced grant from the State of North Carolina, dated July 19, 1892, covering the *locus in quo*, to-wit, that parcel of land included within lines A, B, C, D, A, and included in straight lines from plaintiffs' property to deep water on the east by Pasquotank river. The deep water lines on Pasquotank river and Tiber creek were duly established and regulated according to law as represented on the plat.

Defendant obtained a grant from the State of North Carolina, dated October 2, 1890, covering *locus in quo*, and included in lines A, B, C, D, A, and which is included in straight lines from defendant's property to the deep water on south.

Plaintiffs introduced W. G. Underwood, who testified that he did not know how far Tiber creek extended out; that water five or six years ago covered the *locus in quo*, except a small part near letter A. On cross-examination witness was asked: "You have heard the description of the lot in the deed from Benjamin Spruill to C. L. Cobb; now state whether or not the owner of that lot has any other way to get to deep water on Tiber creek than by crossing that part included in A, B, C, D, A." (Plaintiffs objected; objection overruled, and they excepted). Witness answered, "No, sir."

Plaintiffs then asked whether plaintiff could reach the deep water of the Pasquotank river from her land without crossing the *locus in quo*, and replied, "She could not. The witness said he knew of no division of that piece of land marked lots 7 and 8; that the line on plat was only an imaginary line, and both were owned by the same parties at the same time.

C. Trueblood was introduced, and testified that he had known the *locus in quo* for forty or fifty years; that part of it was covered with water; that high land extended forty or fifty yards south of Fearing street; that the water on south of the lot described in deed from plaintiffs to defendant, and marked "A," was *sometimes called Tiber creek;* that Water street once extended south across the water, and where it crossed *was called Tiber creek.*

A. L. Jones testified that he had known the *locus in quo* for fifty years; that the water came up and covered it ever since he knew it until recently; that the water went up to near where the ice-house stands on the east and south; don't know whether the water to the south of lot described in deed of plaintiffs to defendant, was called Pasquotank river, and do not know it was called Tiber creek; that the water was not navigable except for small boats to the south of said lot; that the only way plaintiffs can reach deep water on Pasquotank river going east is by crossing the *locus in quo*, but they can reach deep water on Tiber creek without crossing it; that the water to south of plaintiffs' and defendant's property is not deep, and will not exceed four or five feet at ordinary tide.

N. R. Zimmerman was introduced and testified that he and his wife executed the deed to defendant, which conveys a lot "located on the south side of old dock and embracing the same, bounded on the east by Pasquotank river, south by said river and Tiber creek, north by old dock and Fearing street, west by the old Messenger lot, now occupied by N. R. Zimmerman and C. E. Zimmerman, thirty feet west from the site of the old warehouse, formerly occupied by William Shannon, being part of the lot sold by William Messenger to B. Spruill," etc.; that there was not much water to south of the premises described in said deed until after he had dredged it; that he had no way to front on deep water on Pasquotank river except by crossing the *locus in quo.* Upon cross-examination he admitted that he had not dredged in the channel of Tiber creek, but his dredging was done on south side of channel and alongside of his wharf on south side of said creek.

Plaintiffs rested.

Defendant introduced grant from the State of North Carolina covering the *locus in quo.*

Plaintiffs objected; objection overruled, and plaintiffs excepted.

Defendant then testified in his own behalf: That he owned the land described in deed from plaintiffs to him marked "A," and has been in possession of same since the execution of same; that he was in possession of same at the time he entered the *locus in quo* and received the grant for the same; that he had lived in Elizabeth City for twenty-four years; Tiber creek extends beyond the bridge on Poindexter street eastward to deep water on Pasquotank river; Tiber creek is navigable; boats carrying merchandise and produce and fish go up Tiber creek as far as the bridge on Poindexter street; vessels carrying several hundred bushels of oysters can and do go up Tiber creek as far as said bridge; Zimmerman has done some dredging on south side of the channel of Tiber creek and next to Zimmerman's wharf on south side of the channel of Tiber creek; that he has been in the quiet possession of the property purchased of plaintiffs and of the *locus in quo;* no demand has ever been made on him for same, except when summons was served, and service of summons is the only demand that was ever made; has driven piles and has been building wharf on the *locus in quo* for eight or nine years; has been building oyster-houses and filling in on part of the *locus in quo* ever since he owned the property described in the deed; at times the tide is very low in Tiber creek; has seen it one time when the tide was so low in the creek you could jump across the channel of the creek to south of my property; part of the land purchased of plaintiffs was made land; the deep water from my land to the east is on Pasquotank river and to the south it is to deep water on Tiber creek. The plaintiffs cannot reach deep water on the east of Pasquotank river without crossing the *locus in quo.* The deep water on Tiber creek was established and regulated by the Board of Town Commissioners at my request on September 23, 1890.

Defendant then introduced J. F. Snell, who testified that he had known Tiber creek since 1856; that the said creek extended out to deep water on Pasquotank river; that he was one of the committee appointed by the Board of Town Commissioners to lay out deep water on Pasquotank river and Tiber creek, and the committee laid it out as represented on map made part of this case; that Tiber creek is south of the property described in deed marked "A," and is its southern boundary; that Tiber creek is navigable to the bridge on Poindexter street; that boats go to the bridge regularly now; that plaintiff did no dredging in channel of Tiber creek, and the creek will float no larger boats since the dredging than before; that the creek is navigable and vessels and schooners can go up the creek and to the south of defendant's property carrying 1,500 bushels of corn or 200 barrels of fish; that he has examined the creek, and it has a distinct channel to deep water on Pasquotank river as laid off by the Town Commissioners; that he drove the piles for defendant's wharf along the line T A B during fall of 1890; that when he was driving the piles along the line, and about twenty-five or thirty feet north of B, plaintiff N. R. Zimmerman came to him and asked if he knew the line; he told him yes; that Mr. Robinson said the line represented on this map as T A B was the line; and plaintiff N. R. Zimmerman told him not to get over that, as the defendant had ordered him not to go on defendant's land, and defendant must not come on his. He then told Zimmerman if he got a pile to the west of that line he would pull it up and drive it on line.

J. T. McCabe testified, in behalf of defendant, that Tiber creek was navigable for vessels and schooners; that the water to south of premises described in deed marked "A" was known as Tiber creek, and it extended to bridge over Poindexter street; that he had seen the creek when the tide was very low, and it had a channel extending out to deep water on Pasquotank river.

Plaintiffs requested the Court to charge as follows:

"1. Riparian rights are property incident to land abutting upon navigable water, and cannot be conveyed without a conveyance of the land to which such rights are incident.

"2. Lands covered by navigable water are subject to entry only by persons whose lands abut upon such waters, and can be entered only in straight lines extending from the front of the high land to the deep water.

"3. If the land in dispute lies between straight lines from the front of plaintiffs' property to the deep water of Pasquotank river, then you will answer the first issue, 'Yes.'

"4. If the land owned by defendant, C. H. Robinson, is made or artificial land, built up by extending eastward into Pasquotank river, he cannot claim riparian rights to the southward, interfering with the rights of plaintiff to extend her property to the eastward.

"5. If the defendant enjoys the right of full commerce by going east, and if by going south plaintiff cannot enjoy the same equal rights, but can on going east, then plaintiffs' riparian rights will also extend to the east in straight lines.

"6. Upon the whole evidence in the case the grant from the State to defendant Robinson is void."

The Court gave charges 1 and 2, and refused to give 3, 4, 5 and 6, to which refusal plaintiffs excepted.

The Court, among other things, charged the jury:

"What are the boundaries is a matter for the Court; where the boundaries are located is for the jury. The several calls in the deed from the plaintiffs to defendant are the boundaries (the calls were read from the deed). And the jury were further instructed that Pasquotank river and Tiber creek were the boundaries along Pasquotank river with the creek to the western boundary. It is for the jury to say how located, and to say whether the defendant's line extended to the bank of the navigable stream, and if so the land in grant to plaintiff is not subject to entry and grant to her."

There was verdict and judgment for defendant, and plaintiffs appealed.

Mr. J. W. Griffin, for plaintiffs (appellants).

Messrs. Grandy & Aydlett, for defendant.

AVERY, J.: The assignment of error is in the refusal to give certain instructions embodied in the prayer of the plaintiffs and the substitution of a different charge in its stead. The Court instructed the jury at the request of the plaintiffs, (1) that riparian rights are property incident to land abutting on navigable water, and cannot be conveyed without a conveyance of the land to which such rights are incident; (2) that lands covered by navigable water are subject to entry only by persons whose lands abut upon such waters, and can be entered only in straight lines extending from the front of the high land to the deep water. Subsequently the jury were told in effect that it was their province to determine whether the defendant's land extended to the bank of the navigable stream, and if it did the grant to the *feme* plaintiff would be void.

The statement of the case on appeal is not so full or so clear as it could have been made. It was incumbent on the appellant to have submitted and insisted on a proper presentation of the facts upon which he relied to sustain his contention. It being left to the jury to determine whether the defendant's line extended to the bank of the navigable water, after they had been instructed in effect that the law would give to the riparian proprietor certain rights as an incident to his ownership of the shore, we infer that they found from the testimony, as they were warranted in finding, that the land of the *feme* plaintiff did not include the shore when the grant from the State was issued to her on the 19th of July, 1890. The plaintiffs had by deed, with a covenant of warranty, conveyed on the first day of September, 1880, a tract of land embracing the old dock and extending south of it, "bounded on the east by Pasquotank river, south by said river and Tiber creek, north by old dock and Fearing creek, west by the old Messenger lot, now occupied by N. R. Zimmerman and C. E. Zimmerman, thirty feet west from the old warehouse formerly occupied by William Shannon," etc. If the jury determined that the line A B was located thirty feet west of the warehouse, and extended on the south to the banks of Pasquotank river and Tiber creek, and on the east to Pasquotank river, then wherever the shore of Pasquotank river may have been then located by accretions, the line of that deed would extend. *Johnston* v. *Jones*, 28 Meyers' Fed. Dec., 725; *Jones* v. *Johnston*, 18 How., 150. If the line A B extended to the margin of Tiber creek, and the boundary on the south and west was the creek and river, as set forth in plaintiffs' deed to defendant, then, no matter where the intersection of the creek and river may have been, the *feme* plaintiff was estopped by her covenant of warranty from asserting ownership of the territory east or north of that line. *Bell* v. *Adams*, 81 N. C., 118. The witness Shell, who was one of the committee appointed by the Town Commissioners to mark the line of deep water, testified that the plaintiff N. R. Zimmerman told him that the defendant's line was that indicated by T A B on the map. There was testimony, therefore, that would warrant the jury in fixing that as the location. Even if the *feme* plaintiff subsequently entered under another title lapping upon their own deed to the defendant, but occupied only the portion south of the line A B, there was no disseizin of any part of the interference, such as to ripen her new title by an actual conflicting possession under a claim of right, and thereby destroy, after an occupation of seven years, the effect of the estoppel. Any deed made to her subsequently would feed the estoppel, and she could only have availed herself of it as color of title by actual occupation of the land previously conveyed. *Eddleman* v. *Cook*, 7 Jones, 616. If we concede that the *feme* plaintiff was not answerable in damages for a breach of the covenant of warranty, she was nevertheless bound by the estoppel until she had not only entered under the new conveyance, but acquired title by possession for seven years. 14 Am. & Eng. Enc., 625; 2 Hermon, sec. 1108; Malone on Real Prop. Trials, p. 403; *Eddleman* v. *Cook*, *supra*.

The law limits the power of a married woman, so that she can only enter into certain executory agreements, enforceable as contracts in reference to her separate real and personal estate. *The Code*, §1826. But the Constitution, Art. X, sec. 6, confers upon a wife the right to devise, or, with the written assent of her husband, convey her land by deed "as if she were single." The right, with the concurrence of her husband, to execute conveyances as if she were a *feme sole*, has been held to empower her to create a lien upon her separate real estate (*Alexander* v. *Davis*, 102 N. C., 17; *Newhart* v. *Peters*, 80 N. C., 166), and if the Courts are to allow her deed to operate to any extent as if she were not under coverture, it must be conceded that the power to convey carries with it, by implication as an incident, the liability to estoppel by the covenants usually contained in conveyances.

We conclude, therefore, that it was not error to leave the jury to determine whether as a fact the defendant's deed from the plaintiffs included the water front, and to instruct them if such was the case that the issue must be found for the defendant. As the counsel for defendant conceded that the appeal was properly constituted, we will only suggest that it may be well in the future to see that exceptions and assignments of error relied upon by appellants are made to appear more explicitly.

There is no error of which the plaintiffs can complain, and the judgment must be Affirmed.

J. W. DRAPER v. N. E. ALLEN AND WIFE.

Vendor's Lien—Married Woman, liability of on notes for purchase of land.

1. The equitable lien of a vendor for the purchase-money of land does not exist in this State, and no change in this respect was made by the constitutional provision that no property should be exempt from sale under execution issued on a debt contracted for the purchase thereof.
2. Although a *feme covert* cannot charge her separate real estate by an obligation in the nature of a contract; unless she be privily examined as prescribed by law, and although her contracts, except in a few instances, will be declared void upon the plea of her coverture, yet equity will not permit her to repudiate a transaction and at the same time retain and enjoy its benefits; therefore,
3. Where a married woman, in an action upon notes given by her for the purchase of land, set up her coverture as a defence, equity will treat her as a trustee and impress upon the land a charge to the extent of the unpaid purchase-money.

CIVIL ACTION, tried at Spring Term, 1893, of NORTHAMPTON Superior Court, before *Hoke, J.*

It is alleged in the complaint that the plaintiff conveyed to the defendant and wife a certain tract of land by deed in fee-simple upon which defendants reside, and that at the time of the execution of the deed the defendants paid $600 cash and gave their joint notes for the balance, $300, the subject of the action; that defendants are in possession of the land, having executed a mortgage thereon to a third party to secure a note for the $600 borrowed by them to make the cash payment.

The plaintiff demanded judgment against the male defendant and that the bonds (which expressed on their face to be for the balance of the purchase-money for the land) be declared a lien upon the land and be enforceable against the *feme* defendant to the extent of her interest therein.

The defendants, admitting the execution of the bonds, alleged that the *feme* defendant had no separate property, and insisted that her contract did not expressly constitute a charge on her property, etc.

Upon an agreed state of facts (as substantially set out above) his Honor declined to give any judgment in affirmance of the contract which would bind or affect the wife's interest in the land, and gave judgment for the amount of the notes against the male defendant, whereupon plaintiff appealed.

Messrs. Benjamin S. Gay and *T. W. Mason*, for plaintiff (appellant).

Mr. R. B. Peebles, for defendants.

Shepherd, C. J.: The only question presented in this appeal is whether the interest of the *feme* defendant in the land mentioned in the complaint can be subjected to the payment of the purchase-money. It is hardly necessary at this late day to cite the authorities which deny the existence in this State of the equitable lien of the vendor for the purchase-money. These will be found collected in the opinion in *Peck* v. *Culberson*, 104 N. C., 425, which case also decides that no change was made in this respect by the constitutional provision that no property shall be exempt from sale under execution issued on a debt contracted for the purchase thereof. See also upon this point, *Moore* v. *Ingram*, 91 N. C., 376. It is also equally well settled that where, as in this case, a married woman sets up her coverture as a defence, her contracts, except in a few instances, will be declared void; nor will she be precluded from pleading her legal incapacity even where it is induced by her fraudulent representations, if such representations grow out of the contract. It is also established that she cannot charge her separate real estate by an obligation in the nature of a contract unless she has been privily examined as prescribed by law. *Williams* v. *Walker*, 111 N. C., 604; *Baker* v. *Garris*, 108 N. C., 218; *Farthing* v. *Shields*, 106 N. C., 289; *Flaum* v. *Wallace*, 103 N. C., 296.

According to these principles, the *feme* defendant having pleaded her coverture, the bonds sued upon are void as to her; and it is also manifest that they cannot be enforced against her general separate real estate as obligations in the nature of contracts.

While these limitations have been placed upon the power of a *feme covert* to bind herself personally or to charge her separate estate, it is not to be understood that she enjoys an immunity from those general principles of equity which sternly forbid one from repudiating a transaction and at the same time retain and enjoy its benefits. On the contrary, these principles have frequently been applied to the transactions of married women and the general doctrine has been enunciated in many cases with which the profession is familiar. *Walker* v. *Brooks*, 99 N. C., 207; *Boyd* v. *Turpin*, 94 N. C., 137; *Burns* v. *McGregor*, 90 N. C., 222; *Hodge* v. *Powell*, 96 N. C., 64; *Williams* v. *Walker*, *supra*; *Atkinson* v. *Richardson*, 74 N. C., 455.

In *Walker* v. *Brooks*, *supra*, a father delivered his daughter (a married woman) a railroad bond of the value of $1,070, and took her bond for $670. The Court held that the difference of $400 was an advancement, but that she could not repudiate her bond for the excess on the ground of incapacity and retain the railroad security. The Court said: "It is not a question of her ability to bind herself by a contract, but whether she can be allowed to retain so much as inures to her own benefit and disavow her own part of the agreement, which was the consideration and condition on which the benefit was accepted." In *Hodges* v. *Powell, supra,* the Court said: "An infant is not bound by his contract, but if he makes a contract and disaffirms it he cannot retain any property acquired by virtue of the contract, and the same principle applies to a married woman. The counsel relied upon *Scott* v. *Battle, supra.* That case is unlike this. There the married woman had executed a deed by herself alone, and it was the folly of the purchaser to take such a deed, but in that case RUFFIN, J., said: 'If a *feme covert* should retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if she had converted it into other property so as to be traceable he might pursue it in its new shape by a proceeding *in rem* and subject it to the satisfaction of his demand.' That is just the case here. The plaintiff has her election. If the obligation is repudiated and disaffirmed, she cannot retain the consideration without compensating the defendant for his damages." The principle laid down in the above case, assimilating a married woman who repudiates her contract on the ground of incapacity to that of a disaffirming infant, at least to the extent that she cannot retain the property obtained under such contract if it can be found or its proceeds traced, is well sustained by reason and authority and is peculiarly applicable to the present case.

It is urged that Mrs. Allen has done all that she contracted to do, and having performed the concurrent act agreed upon—that is, the execution of the bonds—there is no equity that can be asserted against her simply because she does not pay the same. This is a very correct proposition if she had not repudiated her obligations, in which case the same judgment would have been rendered against her as that against her husband. There would have been no equity to charge the land because she failed to pay, and a judgment would have been rendered for the amount of the debt and enforceable like all other judgments, except that as against the land purchased she could not have claimed a homestead. She has not been content to abide by the contract, and the plainest principles of equity require that she should not be permitted to take an unconscionable advantage by retaining the proceeds. In such cases, for the purpose of preventing a fraud of this kind, equity treats the legal owner as a trustee and impresses upon the land a charge to the extent of the purchase-money. Such should have been the judgment in this case, subject, of course, to the rights of the intervening mortgagee. Error.

W. H. HUGHES, Executor of Samuel Calvert, v. R. O. BOONE, Administrator of Charlton R. Boone.

Statute of Limitations—Judgment—Partial Payment.

1. A partial payment made on a judgment does not arrest the running of the statute of limitations.
2. Section 164 of *The Code*, allowing the personal representative of a decedent to sue, does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation.
3. Section 168 of *The Code*, which suspends the statute of limitations during the pendency of a contest over the probate of a will, applies only where there is no administrator or collector during the contest.

CIVIL ACTION, tried before *Bynum, J.*, and a jury, at August Term, 1893, of NORTHAMPTON Superior Court, the sole question presented being the statute of limitations, and the issue submitted being, Is the debt of the plaintiff barred by the statute of limitations?

It was admitted that Calvert, the testator of the plaintiff, obtained a judgment against Boone, the intestate of the defendant, in the Superior Court of Northampton County on January 13, 1873. That an execution was issued and thirty-two dollars paid on it on the 23d of April, 1874. It was further admitted that Calvert, the plaintiff's testator, died on the 3d day of September, 1881; that letters of administration issued to the plaintiff on the 9th day of December, 1881; that a will was afterwards found in which plaintiff was named as executor; that thereupon probate in common form was had and the plaintiff appointed executor on February 2, 1882, and letters testamentary issued on that date, and the letters of administration previously issued revoked.

It was further admitted that on the 4th day of March, 1882, a *caveat* was entered to the will of the plaintiff's testator, which pended until October 5, 1885, when a decree was obtained establishing the will.

It was further admitted that the defendant's intestate, Boone, died on the 20th day of October, 1884, and letters of administration on his estate issued to the plaintiff on the 20th day of October, 1884. The summons in this cause was issued February 26, 1889.

Hughes, the plaintiff, testified as follows: "I knew Charlton Boone; I called the attention of the defendant, his administrator, to this debt shortly after he qualified as administrator; told him there was a judgment; he said his brother, Charlton Boone, left a book which had credits to go on this judgment; I wanted him to pay it; I mentioned it to him several times after this. He told me the legatees told him not to pay it. I said nothing to him about the amount of the judgment."

Upon cross-examination says: "The defendant administrator told me on one occasion that Mr. Bowen, a lawyer, had told him not to pay it, and that the heirs at law told him not to pay it. I was at Charlton Boone's sale; knew he was dead; I do not remember seeing any notice for creditors to present their debts."

This was all the evidence.

Upon the close of the evidence the Court informed the counsel for the plaintiff that he should instruct the jury that if they believed the evidence it would be their duty to return a verdict for the defendant, and answer the issue, Yes. And upon this intimation the plaintiff submitted to a nonsuit and appealed.

Mr. Thomas W. Mason, for plaintiff (appellant).
Mr. Robert B. Peebles, for defendant.

CLARK, J.: The judgment was docketed January 13, 1873. The judgment debtor died October 20, 1884. The judgment was then already barred (*The Code*, §152, par. 1) unless there was something on the other side which suspended the running of the statute of limitations. The partial payment made on the judgment April 23, 1874, did not have that effect. *McDonald* v. *Dixon*, 87 N. C., 404. And, besides, ten years from that date had also elapsed.

Nor did the death of the judgment creditor, September 3, 1881, suspend the statute, for the effect of that was only to give one year's time from the death of the creditor to the personal representative to bring action; if otherwise it would have been barred by the lapse of ten years before such year had expired. *The Code*, §164; *Benson* v. *Bennett*, 112 N. C., 505. But there was more than one year after the death of the creditor before the ten years expired, and therefore section 164 has no place.

Nor does *The Code*, §168, suspending the time during the controversy over the probate of a will, apply, as that evidently from its terms is intended for cases in which there was no administrator during the contest over the will of the debtor. If there was no collector or special administrator of the creditor's estate in such case, it being the plaintiff's own laches, it would not suspend the statute. This distinction appears again in section 164, where one year is allowed after the death of the creditor and one year after administration upon the estate of the debtor. The reason for the difference is pointed out in *Coppersmith* v. *Wilson*, 107 N. C., 31. But even if there was not this distinction and section 168 applied also when there was a contest over the probate of the creditor's will, still, the statute having been pleaded, it devolved upon the plaintiff to show that the claim was not barred (Clark's Code, 39, and cases there cited), and he has failed to show that there was no executor or collector authorized to sue during the pendency of the contest about the probate of the will. Indeed, it appears strongly from the evidence that there was, as the claim was presented by plaintiff to defendant soon after his qualification in October, 1884. Besides, action was not begun within one year after the administration upon the estate of the debtor (even excluding the time of contest over the probate of the creditor's will, which ended October 5, 1885) and the claim was not admitted by defendant administrator (*The Code*, §164), but was denied. The action was begun February 26, 1889. In any aspect it was barred. The plaintiff's debt being barred, he cannot derive any aid from the allegation that the defendant administrator has filed no account or inventory. *Redmond* v. *Pippen*, 113 N. C., 90.

No Error.

F. S. FAISON v. C. HARDY, Trustee, et al.

Injunction—Degree of Proof Necessary to Obtain Interlocutory Injunction—Conflicting Affidavits—Parol Trust.

1. Where a plaintiff claiming an equitable interest in land and seeking to restrain its sale under a deed of trust asks for an account and establishes a *prima facie* case which is not rebutted by the defendant, "a serious controversy" has arisen, which entitles the plaintiff to an injunction and account.
2. A party seeking an interlocutory injunction is not required to establish his right with the same precision and certainty that is necessary on the final hearing; therefore, while on the trial of an issue as to the existence of a parol trust the plaintiff must produce strong and convincing proof of an agreement amounting to a trust existing at the time, the rule does not apply to the intensity of proof to be offered in the prosecution of a remedy ancillary to the real object of the action.
3. Where a purchaser of land executed a trust deed to secure the purchase-money under which the trustee advertised the land for sale, and F. brought an action to restrain the sale and for an accounting, alleging in his complaint that there was a parol trust in the land whereby he became the owner of the equity of redemption therein, and claiming that the notes were entitled to credits other than had been given, and his averments were corroborated by affidavits but denied by the answer of defendant and affidavits in support thereof: *Held*, that the Court properly granted an interlocutory injunction.

This was an APPEAL from an order, in a cause pending in NORTHAMPTON Superior Court, made by *Hoke, J.*, in Chambers, by consent, at Halifax, on May 24, 1893, continuing the restraining order until the hearing, and from which ruling the defendants appealed.

Messrs. R. B. Peebles and *W. H. Day*, for plaintiff.

Messsrs. Thomas N. Hill and *W. D. Pruden*, for defendants (appellants).

MacRae, J.: Passing by the long statement of facts leading up to the matters in controversy, it appears that in 1876 the Farmers' Loan and Trust Company conveyed certain lands by deed in fee-simple to John W. Faison, and said Faison, to secure the payment of certain notes representing the purchase-money for said land, conveyed the same land to Caldwell Hardy, as trustee; said notes are now the property of C. W. Grandy & Sons, and at their instance the said Hardy has advertised said land for sale under the provisions of said deed of trust.

The plaintiff, F. S. Faison, seeks by this action to set up an alleged parol trust in said land, by reason whereof he claims to be the equitable owner of the interest of said John W. Faison in the same, and to enjoin the sale by the trustee, and to have an account taken and stated of the amount now due and owing upon the same, alleging that many credits ought to be placed upon said notes, and that the amount claimed by said Grandy & Son to be due upon the same ought to be largely reduced by reason of said payments; and by reason of the further fact that much usury is also charged.

John W. Faison is dead, and his administrator and heirs are made parties defendant, as also are the said Grandy & Sons, and Hardy, trustee.

Many affidavits are filed on both sides, the complaint and the answer of Grandy and Hardy being also used as affidavits. No answer has been filed by the heirs or representatives of John W. Faison.

A restraining order was granted, and an order to show cause why the same should not be continued until the hearing. Upon the return of said order his Honor Judge Hoke adjudged that the plaintiff had established an apparent right to an interest in said lands and was entitled to an account as prayed for, and continued the restraining order to the hearing, from which order an appeal was taken to this Court.

If the plaintiff has established a *prima facie* case which has not been rebutted by the defendants, he is entitled to an account; for a serious controversy has arisen as to the amount due upon the debt secured by the deed of trust. Clark's Code, p. 299. The question is whether the plaintiff has made out such a case as to establish an apparent right to have a parol trust declared in his favor of the interest held by the deceased (John W. Faison) in said land, which was an equity of redemption—the right to pay the sum really due and to have a conveyance of the land to himself.

It is contended on the part of defendants Grandy & Sons that the burden of showing the parol trust is upon the plaintiff, and a mere preponderance of evidence is not sufficient for that purpose; it must be shown by clear, strong and convincing proof. We concede this contention to its full extent, and adopt the language of this Court in *Hamilton* v. *Buchanan*, 112 N. C., 463: "In order to establish a parol trust, in a case like the present, the proof must not only be strong and convincing (*McNair* v. *Pope*, 100 N. C., 404), but it must also disclose an agreement amounting to a trust existing at the time of the same." But this is the rule to be observed upon the trial of the action and it does not apply to the intensity of proof to be offered in the prosecution of a remedy ancillary to the real object of the action. A party seeking an interlocutory injunction is not required to establish his right with the same precision and certainty that is required upon a final hearing. 2 High on Injunction, sec. 1581.

Without going into an exhaustive examination of the pleadings and affidavits offered *pro* and *con* upon the question of the granting and the continuance of the restraining order, and leaving out of view for the present all allegations of matters occurring since the date of the deed from the Loan and Trust Company to John W. Faison of the Round Pond and Urquhart tracts, and the deed of trust to Caldwell Hardy, we find in the affidavits offered by plaintiff positive averments of the agreement on the part of John W. Faison to hold said land for the benefit of the plaintiff and to convey to the plaintiff upon his paying off the encumbrances. And we find affidavits of facts in corroboration of this averment. On the other hand, the affidavits of the defendants Grandy and Hardy deny any such agreement, and they also offer other affidavits in corroboration. It is a serious question, left in doubt by the affidavits; the security is not depreciating in value; on the contrary, the Urquhart tract is being greatly improved, and no harm can result to the *cestuis que trust* by the postponement of the sale until these questions can be settled by a trial upon the merits. *Whitaker* v. *Hill*, 96 N. C., 2; *Caldwell* v. *Stirewalt*, 100 N. C., 201, and cases cited.

As the disputed question whether the plaintiff has any interest in the matter—in other words, whether there was a parol trust for his benefit—must first be determined by the trial of issues before the necessity for the taking of an account can be ascertained, we will not consider the effect of a failure on the part of the guardian *ad litem* of the minor heirs of John W. Faison to make any answer to the complaint, whether it is an admission which will bind the infants or not, but we direct attention to the remarks of Bynum, J., in *Isler* v. *Murphy*, 71 N. C., 436, where notice had been served upon infant heirs and a guardian *ad litem* had been appointed, and had expressly refused to act; also to section 182 of *The Code*, requiring the guardian *ad litem* to file an answer. The restraining order was properly continued until the hearing. Affirmed.

C. T. JOHNSON et als. v. J. T. GOOCH, Administrator, etc., et als.

Construction of Will—Extinguishment of Debt—Practice—Defect of Parties.

1. Where a wife declared in her will that if her husband should pay off and discharge all the debts contracted by him prior to his marriage with her he should take and hold all her estate absolutely and for his own sole use and benefit, the discharge by the husband, in his life-time, of his debts of that class *eo instanti* vested in him the absolute title to the estate so devised, and it became subject to his debts contracted subsequently to the marriage.
2. The purchase by a judgment creditor, at his execution sale, of property levied upon as belonging to the judgment debtor, for a sum sufficient to pay the debt, interest and costs, was a discharge and extinguishment of that particular debt, notwithstanding the property so sold was afterwards, in a suit by the owner against the creditor for damages, adjudged to be the property of the former, for, although a new cause of action thereupon arose in favor of the judgment creditors against the judgment debtor, it did not revive the judgment debt which had been satisfied.
3. Where a defect of parties appears on the face of the complaint it should be taken advantage of by demurrer; if such defect does not so appear, the defendant, in his answer, should set out the names of those who are necessary parties, to the end, in either case, that the Court, being thus informed, may decide, before the trial of the issues of fact or law, that all necessary parties are present.
4. Where in a pending suit one of the parties asks for the appointment and joinder in the suit of a trustee for the applicant in the place of a deceased trustee, the appointment so made is binding only on the party so requesting it.

CIVIL ACTION, tried before *Bynum, J.*, and a jury, at August Term, 1893, of NORTHAMPTON Superior Court. The action was originally commenced by Catherine T. Johnson, Cornelia Johnson and Lula Johnson, as plaintiffs, against J. T. Gooch, as administrator *de bonis non, c. t. a.*, of Virginia A. Johnson, as defendant. W. W. Peebles and

R. B. Peebles were afterwards made parties defendant. The said Catherine was sister to Dr. James Johnson and trustee under the will of Virginia A. Johnson. The said Cornelia and Lula were the only unmarried daughters of Dr. James Johnson at the time of the death of the said Virginia. Pending this action the said Catherine and Cornelia died intestate and without issue, and having never been married, leaving them surviving the plaintiff Lula and two sons and two married daughters of Dr. James Johnson as their heirs at law and next of kin. At the Spring Term, 1892, of said Court, by motion in the cause before his Honor Judge Brown, without motion or action by the heirs at law or personal representatives of the said Catherine and Cornelia, or either of them, the defendants objecting and excepting, J. T. Flythe was appointed and substituted as trustee in the place of Catherine T. Johnson, with power to prosecute this action, etc., and was made party plaintiff.

To this order the defendants objected and excepted.

At the August Term, 1893, of said Court, before Bynum, J., the following issues were submitted to the jury, to-wit:

"1. Did James Johnson owe any debts contracted prior to his marriage with V. A. Johnson?

"2. If so, did he pay off and discharge all said debts at any time prior to his death?

"3. Were the debts under which the land was sold contracted after the said marriage of James Johnson?"

The defendants in apt time tendered this issue, to-wit:

"If said Johnson owes any such debts were they paid off or discharged prior to the commencement of this action?"

The issue was refused, and the defendants excepted.

The will of Virginia Johnson was as follows:

"*First.* I devise and bequeath my whole estate to Catherine Johnson, my sister-in-law, in trust for the following purposes, namely, in trust to hold and preserve the same from all liabilities to the debts of my husband, James Johnson, which were contracted by him prior to our intermarriage.

"*Secondly.* To hold the same subject to the foregoing provision for the use and benefit of my husband, the said James Johnson, during the term of his natural life, and at his death to dispose of and convey the same in such manner and to such persons and purposes as the said James Johnson may, by his last will and testament, direct.

"*Thirdly.* In case any person or persons should take proceedings to subject any portion of my estate, held in trust as aforesaid, to the debts of the said James Johnson, which were contracted prior to my marriage with him, then and in that case all interest, whether as *cestui que trust* or otherwise, of the said James Johnson in my said estate, shall instantly cease and determine; and the said Catherine Johnson shall thereafter hold the same divested and discharged of the aforesaid trusts and upon the following trusts, namely, in trust for her own use and for the use of such of the daughters of my said husband, James Johnson, as may then never have been married, as long as they remain single; as each may marry her interest shall cease, and when all are married, then in trust for her own use, and the use of the married daughters of the said James Johnson, share and share alike. On the death of the said Catherine Johnson her interest shall cease and go over into the common fund for the benefit of the other *cestui que trust*.

"*Fourthly.* Subject to the following provisions, I declare that Catherine Johnson shall have power to sell any portion of my real estate and make title to the purchasers on receipt of the purchase-money, and the like as to my personal estate, and shall re-invest the proceeds to be held upon the same trusts as the original estate.

"*Fifthly.* In case my husband, James Johnson, should die without having executed any last will and testament I declare that my said estate shall be held by Catherine Johnson upon the trusts declared in the third clause of this my will.

"*Sixthly.* In case the said James Johnson should fully pay off or discharge by any means all and every of the debts contracted by him prior to my marriage with him, then and in that case I declare that he shall take and receive all of my aforesaid estate free and discharged from all the trusts in the premises declared, and shall hold the same absolutely for his own sole use and benefit."

Dr. James Johnson died intestate 16th of March, 1876. V. A. Johnson and James Johnson were married August 30, 1859. Upon said issues the plaintiffs introduced Dr. A. J. Ellis as a witness, who testified that he knew Dr. James Johnson. Plaintiffs then asked witness whether Dr. James Johnson owed him anything at the time of his death, and if so, has it ever been paid. To this defendants objected under section 580 of *The Code.* Objection overruled, and defendants excepted. "For this debt I took judgment against him in 1857 or 1858."

The record of said judgment was afterwards introduced, and it showed that said judgment was rendered at the September Term, 1859, of the Court of Pleas and Quarter Sessions of Northampton.

This witness stated that said debt had never been paid; that he did not know Dr. Johnson's financial condition, and that he did not know of any other debt that he owed.

On cross-examination this witness said: "I reduced this debt to judgment, had an execution issued and levied on some cotton as the property of Dr. James Johnson, and the Sheriff sold it under said execution as the property of Dr. James Johnson, but Catherine Johnson claimed it, and after the war brought suit against me and recovered back the value of the cotton. I think the cotton was seized and sold about March, 1859. I bought the cotton at the execution sale at a bid sufficient to pay in full the amount of my judgment and interest and costs. I got the cotton. Catherine Johnson claimed it, and after the war she sued me and got judgment against me for the value of the cotton, and I paid it. I brought no suit against Dr. Johnson, nor did I ask him for the money that Catherine recovered against me."

On the re-direct examination this witness stated: "I was present at the trial of Catherine Johnson's suit against me." Under objection by the defendants this witness was permitted to say that in that case the cotton was adjudged to be the cotton of Catherine Johnson. Plaintiffs then offered judgment of Court of Pleas and Quarter Sessions, dated September 5, 1859, in the case of A. J. Ellis, as administrator of Robert Ellis, against James Johnson for $449.19, it being the judgment under which cotton was sold, and for the only debt of James Johnson due this witness. This witness said: "This debt was a security debt. My father and J. J. Long were sureties for Dr. James Johnson to John Summerell. My father died in 1857. I qualified as his administrator at the next term of the Court after his death. Long paid the whole debt to Summerell. I paid Long my father's half of it soon after I qualified as his administrator. This judgment was taken by me against Johnson for that money and to pay it. Said cotton was sold by the Sheriff and bought by me. I never brought any suit against Dr. James Johnson for the money that Catherine Johnson recovered against me." This was all the evidence offered by plaintiffs.

The defendants then put in evidence three judgments and executions against James Johnson under which the land known as Diamond Grove was sold when the defendants W. W. Peebles and R. B. Peebles became the purchasers.

The defendants asked the Court to charge that if the jury believed the evidence of Dr. Ellis they should find that the surety debt mentioned by him was discharged prior to the date of James Johnson's death; that upon the whole evidence the jury should answer "No" to the first issue and "Yes" to the others; and that upon the evidence the jury should answer "No debts" to the first issue and "Yes" to the others.

The Court refused all of said prayers, and upon the request of the plaintiffs charged the jury that if they believed the evidence of Dr. Ellis they should answer the first issue "Yes" and the second "No."

The jury answered "Yes" to the first and third issues and "No" to the second.

There was judgment for the plaintiffs, and defendants appealed.

Mr. Thomas W. Mason, for plaintiffs.

Messrs. W. H. Day and *R. B. Peebles*, for defendants (appellants).

BURWELL, J.: The fund held by the defendant Gooch, administrator, which is the subject of this controversy, is the proceeds of the sale of a tract of land that once belonged to Mrs. Virginia A. Johnson. All parties concede that it is liable for her debts. The defendants R. B. Peebles and W. W. Peebles assert title to the balance that will remain after the payment of her debts, and found their claim thereto on the fact that they hold by purchase at execution sale the estate of James Johnson in said land, and this seems to be conceded. The plaintiffs base their claim to the fund upon the allegation that the land was not the property of James Johnson, and that under the will of Mrs. V. A. Johnson it was theirs, subject only to the payment of her debts. The defendant Gooch avers that if the fund does not belong to his co-defendants there are other persons besides the plaintiffs who have an interest in it, and that he should be protected from the possible demand of those claimants before he is required to pay over the fund.

Throughout the will of Mrs. Johnson there is, we think, the clearly expressed intent to provide that her husband shall have and enjoy all her estate, and there is effectual provision made to prevent the disturbance of that enjoyment of it by any creditor of her husband whose debt was contracted before her marriage to him. She seems to have been determined, for some reason, that no one of that class of his creditors should get satisfaction of their claims against him from any property that had belonged to her. The provisions of the first five sections of her will must be considered as controlled in their operation by the sixth and last section, which plainly declares that if her husband shall pay off and discharge all the debts contracted by him prior to his marriage to her, he shall take and hold all the estate "absolutely for his own sole use and benefit."

If, therefore, all the debts of James Johnson which belonged to that class were discharged in his life-time, *eo instanti* the property thus devised became his absolutely, the danger against which she was so careful to guard her estate being thus destroyed, and there being no further reason, as she seems to have thought, why he should be kept out of the absolute ownership of that property which she wished him to enjoy.

We think that the evidence of plaintiffs' witness Ellis (objection to the admission of which was withdrawn here), while it established the fact that James Johnson was, in September, 1859, a judgment debtor to him, the debt being of the class mentioned above, also proved that that judgment was fully discharged in the following March by the levying on and selling of cotton, and the purchase of it by the judgment creditor, the witness, at a price sufficient to pay the debt, interest and cost, as stated by him. That ante-nuptial debt was thereby extinguished. *Wall* v. *Fairley*, 77 N. C., 105, and cases cited. And if it be true that thereafter he was sued by a person who asserted that the cotton so sold was her property and not the property of James Johnson, the defendant in the execution, and damages were recovered of him, that created no liability on the part of the defendant to pay again the judgment that had been discharged, but merely gave to the judgment creditor a cause of action against the judgment debtor, under section 27 of chapter 45 of the Revised Code (*The Code*, §468), for the sum so recovered of him. No such action was brought. If it had been, and had been successful, it would not have fixed James Johnson with an ante-nuptial liability.

The extinguishment of this judgment and the discharge of all his other liabilities of that class had the effect to invest him with the absolute title to the estate of his wife, and it would be unreasonable to declare that he had lost that title because a new cause of action arose against him, though it was in some degree connected with an ante-nuptial debt. We think, therefore, that his Honor erred when he instructed the jury that if they believed the evidence of Ellis they must find that the ante-nuptial debts of James Johnson had not been paid off and discharged by him in his lifetime. The only debt of that class that is in dispute, as it seems, was discharged by the sale of property alleged to belong to him. That was a discharge of it "by him."

If the defendant Gooch is advised that there is a defect of parties he should file a demurrer in which he should state what persons should be brought in, their presence being *necessary* to a determination of the controversy. This course is prescribed if the defect appears on the face of the complaint. If it does not so appear he should in his answer set out the names of the persons who he is advised are necessary parties, and their interest in the matter in controversy, to the end that the Court, being thus informed either by his answer or demurrer, may decide, before the trial of the issues of fact or law is determined, that all *necessary* parties are present. The defendant Gooch has not in either of these ways brought up this question. He is the holder of the fund. The other parties, plaintiff and defendant, are adverse claimants of it. Since, for the reasons above stated, there must be a new trial of the action, he will have an opportunity thus to protect himself from other claimants, either of the whole fund or of parts of it, if any there be.

We deem it proper to say that the appointment of J. T. Flythe to be trustee in the place of Catherine J. Johnson, deceased, is binding only on that one of the daughters of James Johnson who is the plaintiff here and asks for his appointment. Error.

F. W. HUGHES v. WESTERN UNION TELEGRAPH COMPANY.

Action for Damages—Erroneous Transmission of Telegraphic Message—Speculative Damages.

Where one in consequence of a mistake in the transmission of a telegraphic message was induced to sell property at a less price than he could thereafter have sold it for, but did receive its then market value, he suffered no damage for which an action will lie beyond the cost of the telegram.

ACTION for damages, tried at Fall Term, 1893, of CRAVEN Superior Court, before *Bynum, J.*

The plaintiff proved that he lived in the city of Newbern, North Carolina, and had for eighteen months prior to the time of receiving the telegraphic dispatch as set forth in the complaint, to-wit, the 21st day of April, 1892, been engaged in buying and selling stocks on the New York market; that he carried on his correspondence in regard thereto over the telegraphic lines of the defendant; and that for about a year before and up to the said date, April 21, 1892, he received from the defendant the quotation of the prices of certain stocks in which he dealt three times every day; that he would receive quotations, and telegraph over defendant's lines to Falmstock & Co., in New York, to buy or sell stocks for him based on the information so furnished him by the defendant.

That defendant also regularly furnished the plaintiff with information as to the declaration of dividends on such stocks after same had been declared; that a short time before said 21st day of April, 1892, the plaintiff went to the said city of New York to obtain information in regard to the stock of the American Cotton Oil Company, and while there obtained information that said American Cotton Oil Company would declare a dividend on its preferred stock early in May, 1892; that upon his return to Newbern said plaintiff sent a message to said Falmstock & Co., his said agents, over the telegraph lines of the defendant, asking said Falmstock & Co. to keep him posted as to said dividend; that the said Falmstock & Co. owned large amounts of said stock, and had means to obtain information concerning said dividend, and had told plaintiff when he was in New York, as aforesaid, that said dividend would be declared the first part of May; that in reply to said message so sent to said Falmstock & Co. by the plaintiff said Falmstock & Co. delivered to defendant in said city of New York, to be sent to plaintiff at Newbern, over the defendant's lines, the message set forth in the complaint, to-wit:

To F. W. Hughes, Newbern, N. C.:

Natty at close chapel fancy probably be declared May third. FALMSTOCK & CO.,

and paid defendant its price for the transmission and delivering of said message.

That said message meant, according to the cipher code used by plaintiff, "The market is firm, with upward tendency at close: Cotton Oil Preferred three per cent. dividend will probably be declared May 3d."

That the defendant never delivered said message to the plaintiff, but did, on said 21st day of April, 1892, deliver to plaintiff a message as follows:

APRIL 21, 1892.

To F. W. Hughes, Newbern, N. C.:

Natty at close chapel fancy probably be declared May thirty. FALMSTOCK & CO.,

the word "third" in said message having been changed to the word "thirty" in the message delivered to plaintiff by defendant, as stated in the complaint.

That on said 21st day of April, 1892, the plaintiff owned eight hundred shares of said preferred stock of the American Cotton Oil Company, then worth about $60,000; and that the said company did on said the 3d day of May, 1892, declare its dividend on said stock; that plaintiff gave the defendant no information as to his reasons for desiring information as to the time at which said dividend would be declared, except such information as defendant received from said dealings with plaintiff, and such as appears from the faces of said telegraphic messages; there was no evidence to show that the defendant, its agents or employees, had any knowledge as to the true meaning of said cipher message, except as aforesaid.

Plaintiff then proved (defendant objecting, and its objections overruled, to which it excepted) that by reason of said mistake in said telegram plaintiff immediately sold in New York five hundred shares of the stock, four hundred shares at the price of seventy-six and a half cents, and one hundred shares at the price of seventy-seven cents on the one dollar face value thereof, which were the market values of said shares at the time of said sales; and that a few days thereafter, and as soon as plaintiff learned of said mistake in the said telegraphic message, to-wit, on the 29th day of April, 1892, he tried to repurchase said stock in New York, or a like quantity thereof, and did purchase three hundred shares thereof, two hundred shares at seventy-nine and three-quarter cents, and one hundred shares at eighty cents on the one dollar face value thereof; and that at the time plaintiff learned of said error and mistake in said telegraphic message, which was within a few days, said stock was selling on the market in New York at seventy-eight and one-half cents on the one dollar face value thereof; that the difference between the amounts for which plaintiff sold his stock, as aforesaid, after receiving said dispatch and what he could have gotten at the time he learned of said error and mistake was $1,025; that he, the plaintiff, did not recollect the exact price at which he subsequently sold the stock so repurchased, but that he knew that he had sold some of it at seventy-eight and a half cents, and some of it at less than seventy-six and a half cents on the one dollar face value thereof, but did not recollect when he sold it.

The defendant stated that it did not rely on the objections set up in the answer to plaintiff's demand on the defendant, or as to the defence that the message had not been repeated, and did not offer any evidence.

The Court charged the jury:

That plaintiff was not, under the whole evidence, entitled to recover from the defendant any other sum or damages than the price of said telegram, to-wit, fifty cents, to which the plantiff objected, and excepted.

The jury found the issue in favor of the plaintiff, and assessed his damages at fifty cents.

Plaintiff appealed from the refusal of his motion for a new trial.

Messrs. M. De W. Stevenson and *Busbee & Busbee*, for plaintiff (appellant).

Messrs. Strong & Strong, for defendant.

BURWELL, J.: The plaintiff's allegation is to the effect that the defendant made a mistake in the transmission of a telegram directed to him and relating to the stock of the American Cotton Oil Company. He says that if the message had been delivered to him as his correspondent wrote it he would not have sold five hundred shares of that stock which he then owned, but that being misled and deceived by the false information thus negligently furnished him by the defendant, he did sell those shares of stock.

If, because of defendant's negligence, the plaintiff had disposed of his property at less than its value, there would be some foundation for the plaintiff's demand for damages above the cost of the telegram. But it appears that he got for his stock, when he sold it, "the market value" thereof. The "market value" of such property, nothing else appearing, is its value. It cannot be said that one suffers damage when induced to exchange his property for its value in money. He has, after the exchange, what to the law appears to be the exact equivalent for that which he has sold.

But the plaintiff says that this class of stock advanced in price soon after he was so induced to sell, and that he bought three hundred shares at the advanced rate. The defendant cannot, we think, be held liable for this conduct of the plaintiff. It did not induce him to buy. As we have said, he suffered, it appears, no damage by reason of being induced by the erroneous message to sell. We cannot indulge in speculation as to what might or might not have happened if the telegram had been correctly transmitted. To do so would be to concern ourselves about speculative damages, which are not recoverable. *Pegram* v. *Telegraph Co.*, 100 N. C., 28; *Telegraph Co.* v. *Hall*, 124 U. S., 444.

The view we take of this matter renders it unnecessary for us to consider the question whether or not there was any evidence that the defendant knew of the importance of the message and of the consequences likely to follow its incorrect transmission. No Error.

*W. W. BOOMER et al. v. ALEXANDER GIBBS.

Action for Delivery of Land—Survey—Overlapping Boundaries—Adverse Possession of Lappage.

1. Positive proof of the location of a corner called for in a grant will control course and distance, but where the evidence leaves in doubt the actual site of the corner it is the duty of the jury to be guided by what is, in that event, the more certain description—the course and distance.
2. The test of the sufficiency of possession of land to mature title is the liability of the occupant to an action of trespass in ejectment.
3. Where the boundaries of two grants or deeds lap upon each other the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage.
4. Possession of part of the lappage by the one having the inferior title gives constructive possession of the whole lappage so long as the one having the better title has not actual possession of any part.

CIVIL ACTION for title and possession of land, tried at the Fall Term, 1892, of the Superior Court of HYDE County, before *Hoke, J.*

The plaintiffs deraigned title through—

First, grant to William Watson, dated October 2, 1817; second, will of William Watson devising one-half of the land covered by the patent each to his sons, Augustus and James M. Watson; third, deeds of James M. Watson to plaintiff, W. W. Boomer, dated February, 1873, and of Augustus Watson to plaintiff, Riley Murray, dated August, 1852, conveying their respective interests in the land embraced within the limits of the patent, which it is admitted covers the *locus in quo.*

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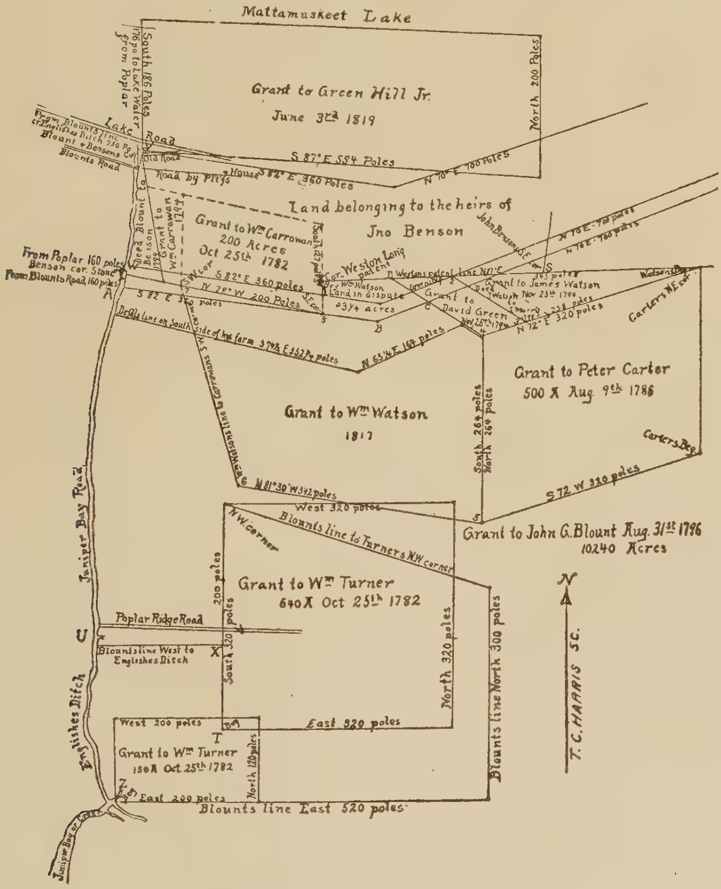
*SHEPHERD, C. J., did not sit on the hearing of this case.

The defendant relied upon two defences: First, that the *locus in quo* was covered by a grant to John Gray Blount, dated November 26, 1799; second, upon possession under a deed from Eli Smallwood to Thomas Gibbs, dated November 26, 1849, and the will of said Thomas Gibbs, dated in 1854, devising said land to the defendant, Alexander Gibbs.

The map exhibited on the trial was as follows:



Joseph H. Wahab, a witness for both plaintiff and defendant, testified as follows, to-wit: "I am a surveyor; made a survey of the lands in dispute under an order of the Court, and made the plats in this case. The point I on the map was pointed out to me in the presence of both parties as the 'westernmost back corner of the Weston Long patent,' the point 7 as the south-west corner of the William Carrowan patent, and the point 8 as the south-east corner of the same patent. I do not know where the Indian stake on Pamlico Sound is, nor did I run from there to the head of Juniper Bay at the James English landing. Both parties were present and there was no dispute as to the location of the James English landing. I located the Z on the map as the beginning of the 150-acre Turner patent, and the T as the south-west of the 640-acre Turner patent; ran from Z to T, then up the line of Turner's patent to a point X, which would be 200 poles from Turner's north-west corner (X) by platting the same; then I ran west 220 poles or thereabouts to English's ditch, which I struck at the point U; then I ran up the road and the 750 poles would give out at V. This point is 176 poles from where the lake is now; that is, from the water of the lake. The point A on the map is 160 poles from the place that was shown me as where the old Blount road went into the Juniper Bay road. There was a sign of the old Blount road there at that time. The point W is 160 poles from a place that was shown me that a poplar used to stand. This is at the head of the Juniper Bay road as it now is. W is about four chains north of A. I did not run any of the other lines of the Blount grant, but from my knowledge of the location of the grant the other lines called for would close in to the beginning.

"The point T on the map is the south-west corner of the Reuben Benson land, and the point called for as such in the deed from Eli Smallwood to Thomas R. Gibbs; thence eastwardly to the south-east corner of the said tract I ran to the point which is the south-east corner of the William Carrowan land, and is also one of his south-east corners; then I turned and ran north to the point 1, which is also a Benson corner and the corner of the Weston Long patent in the Carrowan patent; then I turned eastwardly and ran along the Weston Long patent to the point south, which was pointed out to me as one of John Benson's corners. I ran the line A, 8, B on the map. I found nothing at B; at 8 I found a stone, and this is known as one of Benson's corners and the south-east corner of the Carrowan patent. If Blount's line stopped at A and then ran to B, then Blount's line would pass through the point 8. If you run north to the point V, at the end of the 750 poles, there would be no Benson corner in any of the Blount lines which run eastwardly, nor would there be if you stopped at the point W and then ran east the calls of the Blount grant. Reuben Benson lived on the Selby patent, and on neither the Carrowan nor Weston patent. If the point T is the south-west corner of the land on which Reuben Benson lived, then the point 8 would be the south-east or one of the southern corners.

"I do not know where Sam Weston's house on the lake where he formerly lived is situated. I know where Bluff Bay is situated. If the Smallwood deed runs eastwardly to the Juniper Bay by ditch and thence up to the stone at T, which is Benson's south-west corner; thence eastwardly to 8; thence up to I; thence eastwardly to S, as the south-east corner of the John Benson land, and thence southwardly to Bluff Bay, it will include the *locus in quo*. If Smallwood's deed to Gibbs stops at T and then runs to 8 and eastwardly to B, it would not include the *locus in quo*. Martin lived outside of the patent and towards the lake."

The witness further testified that he surveyed the Smallwood deed from Benson's south-west corner at T, and then to 8, and then to 1, and then to S, which was pointed out to him as the south-east corner of the John Benson land at a point on the Weston Long patent; that he did not make any actual survey east of that point; that he did not know where the Samuel Weston house was built, but that he knew where Bluff Bay was and the other points called for in the Smallwood deed south of this point S, and from such knowledge testified that the remaining lines of the Smallwood deed would close up and embrace the *locus in quo*.

The other facts connected with the trial are stated in the opinion of Associate Justice AVERY.

There was verdict and judgment for the defendant, and plaintiffs appealed.

Mr. W. B. Rodman, for plaintiffs (appellants).

Mr. L. C. Latham, for defendant.

AVERY, J.: The land in controversy is included within the lines indicated on the map by the letters and figures 8, I, D, C, B to 8, and the first question raised by the testimony was whether the limits of the John Gray Blount patent extended north to V and then ran south 82 east so as to include the *locus in quo*, or no further north than A, so that the next line would run south of it to B. The call of the patent which gave rise to the dispute was, "Then with the same (English's ditch just previously mentioned as the terminus of the line running west 220 poles) and the road northwardly seven hundred and fifty (750) poles to a point 160 poles from the lake along the road." If the point A had been shown by undisputed testimony or had been admitted to have been 160 poles from the margin of the lake and along the road mentioned when the survey was made under which the grant was issued, such positive proof would have controlled course and distance and established the location of the corner at A, though less than 750 poles from the last station. *Strickland* v. *Draughan*, 88 N. C., 315. But as the testimony was conflicting it was the province of the jury to determine whether the corner was satisfactorily shown to have been originally located at A, and if, in their opinion, the actual site of that corner was left in doubt by the evidence, it was their duty to be guided by what would in that event be the more certain description—the course and distance. This controverted question of fact was therefore properly submitted to the jury with appropiate instruction for their guidance. *Marsh* v. *Richardson*, 106 N. C., 539; *Dobson* v. *Whisenhant*, 101 N. C., 645; *Jones* v. *Bunker*, 83 N. C., 324; *Redmond* v. *Stepp*, 100 N. C., 212; *Spruill* v. *Davenport*, 1 Jones, 203.

If the Blount patent issued in 1799 covered the land in dispute an older outstanding title was shown than the grant to Watson in 1817, and the plaintiff could not recover. But in case the jury fixed the location of the disputed corner of the older patent at A it became necessary for the defendant to fall back on his second ground of defence—that he and those under whom he claimed had acquired title by possession under the deed of Smallwood to Thomas Gibbs in 1849, and the devise of Thomas Gibbs to the defendant in 1854, as color. The boundary of the grant to William Watson is admitted to be correctly indicated on the map by the lines 1, 2, 3, 4, 5, 6, 7, 8, I, and to include the *locus in quo*, and if the Blount patent was bounded on the north by the line A B it did not cover the disputed territory. The calls of the Smallwood deed, which gave rise to the controversy as to the location of its boundaries, were as follows: "Then (viz., from the south-west corner of the Reuben Benson tract where he formerly lived) with Benson's line to his south-east corner of his said tract, now John Benson's; then eastwardly with the line of the John G. Blount 10,240-acre grant, to a stake, 150 poles from Sam

Weston's (deceased) house, where he formerly lived, on the lake; then south to the West Bluff Bay; then down said bay to the sound." It was admitted that Reuben Benson's south-west corner was at a point indicated on the map by the letter T and that the next calls were properly run to 7 and 8, and the defendant contended that the "stake 150 poles east of Sam Weston's house" was located at 1, and that the boundary extended then to S so as to include the *locus in quo* (by running to the other points called for) within the bounds of the Smallwood deed—while the plaintiff insisted and asked the Court to instruct the jury, that there was no testimony tending to show where the stake called for was located, and that consequently the true line was from 8 to B instead of to 1, thus locating the northern boundary of the Smallwood deed south of the disputed land at 8 to B instead of along the line I to S. The surveyor Wahab had testified, without objection, that while he did not know where the Samuel Weston house was built he knew where Bluff Bay was, and "*the other points called for in the Smallwood deed south of the point S, and from such knowledge that the remaining lines of the Smallwood deed would close* up and embrace the *locus in quo*." It does not appear that the plaintiff's counsel examined the surveyor so as to test the grounds of his opinion before the jury. Without further inquiry as to the manner of acquiring a knowledge of the location of the remaining corners the jury might fairly have drawn the inference that the surveyor knew, from sources satisfactory to him, where the point of intersection with Bluff Bay was, and had demonstrated the fact, by surveying and plotting, that only a line run southwardly from 1 to S would fill the description of both calls first "with the line of the John G. Blount 10,240-acre survey," and then southwardly to the known corner on the bay. Upon this point the Court refused the request of the plaintiff to instruct the jury that there was no testimony to show the location of the stake, and instructed them, among other things, as follows:

"Defendant contends that the true location of the deed calling for the Benson line to his south-east corner of his said tract, now John Benson's, runs from T to 7; then to 8; then to 1; then along the line of the Weston Long patent to the point 8, and then to close in the lines of the deed, in which case it would include the land in controversy.

"Now, if the jury are satisfied, from the evidence, that the Benson line called for in the Smallwood deed runs to 7, to 8, then north to 1, and then along the Weston Long patent to S; if the point S was the south-east corner of the Benson land called for in the Smallwood deed and the line approaching it and called for in such deed was along the Weston Long patent from 1 back to 8, to 7 and then to T, being a known and visible line, then the possession of defendant in such deed and in the Watson grant for the seven consecutive years would mature their title to such boundary.

"And this would be true were the said possession, was the south land, marked in plat, 'Land in dispute.'"

The Court here recited all the evidence, and stated the position of parties on this point and referred to call in deed for running easterly with the Blount line as evidence and circumstances on location, telling the jury the occupation of defendant of land in dispute since 1867 was not sufficient to ripen title, because of the suit of plaintiff in 1876, and that the time from May 20, 1861, to January 1, 1870, would not be counted.

The Judge evidently submitted the question of location to the jury in view of the surveyer's testimony taken in connection with the call in the deed for running with the line of the Blount survey, and we think, for the reasons given, that there was no error in so doing. In addition to the evidence of Wahab it appears also that another surveyor, George W. Swindell, testified without objection that Marshall Swindell had pointed out the place indicated by S on the map as a corner of the Benson land, and this tended to strengthen the other testimony offered to locate the line 1 to S. But when it is admitted that the Watson grant embraced within its limits the land in dispute, if the Blount patent did not include it, would a possession of seven years under the Smallwood deed and the will of Thomas Gibbs as color mature the title of the defendant to such portion of the territory covered by the deed as was included within the lappage on the Watson grant? It was admitted that the defendant did not occupy the land in dispute north of the line T to 8 before 1867, nor for the period of twenty-one years, when the statute was running after that time; so that in the contingency mentioned the defendant must rely upon showing title out of the State by the grant to Watson and in himself by possession for seven years under color of title. If prior to 1867 the plaintiffs or those under whom they claim were in the actual possession of any portion of the Watson grant outside of the lappage (which, if the Smallwood deed extended to the line 1 S, would be identical with the *locus in quo*) and the defendant was in the occupation of some portion of the land embraced in the Smallwood deed but south of the disputed land, the law would, while such was the status, give the constructive possession of the entire lappage to those holding under the grant, which was the older title, as it would so long as neither party entered and occupied under his title. *McLean* v. *Smith*, 106 N. C., 172. "If one be seated on the lappage and the other not the possession of the whole interference is in the former." *McLean* v. *Smith*, *supra; Williams* v. *Miller*, 7 Ired., 186. There was evidence tending to show that the defendant had entered upon the lappage in 1867 and had since such entry occupied and cultivated some portion of it for more than seven years when the statute of limitations was running. So long as the defendant was seated on it and the plaintiff was not, the possession of the whole lappage was constructively in the defendant if it was embraced in his deed, because the moment he crossed over the plaintiff's line his purpose to claim adversely was unmistakable and his liability as a trespasser to one having a better title was unquestionable. The law therefore would attach the usual penalty for the laches of the plaintiff in failing to maintain his right by an action. *Williams* v. *Miller, supra; Osborne* v. *Johnson*, 65 N. C., 26. If the plaintiff during the time when the defendant so occupied the lappage had also been seated on it, the better title would have drawn to the former the constructive possession of all of the interference except so much as was embraced within the actual enclosure of the defendant. Until the defendant crossed the south line of the lappage, however, and made himself a trespasser upon the territory embraced within the Watson grant the plaintiffs could maintain no action against him, because he might have shown good title up to their line and that he had not ventured beyond. Though as a rule a man is presumed to claim to the outside boundaries of his paper title (*McLean* v. *Smith, supra; Ruffin* v. *Overby, supra*), yet that presumption does not disturb the constructive possession of one holding by superior title. The sufficiency of possession to mature title depends upon the liability of the occupant to an action of trespass. "This is the test." *Osborne* v. *Johnson, supra.* It would be hard measure if the defendant could, by a possession for seven years south of the *locus in quo*, acquire title to the lappage, which is the *locus in quo*, without incurring liability as a trespasser upon it. Where the boundaries of two grants or deeds lap upon each other the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage. When such claimant enters into the exclusive occupation of the interference he extends his constructive possession to the outside limits of his deed, but if the grantee under the older title seat himself upon it at any moment before the end of the statutory period, he in turn extends his constructive possession to the whole interference, except the *possessio pedis* of the other. If the defendant had entered upon the land in dispute and held adversely so as to subject himself constantly to an action his title would have matured in seven years, since he could have availed himself of the plaintiff's grant to show title out of the State. *Gilchrist* v. *Middleton*, 107 N. C., 663.

We think that the learned Judge who tried the case below erred when he instructed the jury that a possession south of the line 8 B for seven years was sufficient to ripen defendant's title under the Smallwood deed. It is perhaps well to add, in view of the fact that the point may be raised on another trial, that the map offered was not competent as evidence *per se*, but could be used by a witness under examination to explain and elucidate his testimony. *Dobson* v. *Whisenhant*, 101 N. C., 645. For the error in the instruction given as to the effect of a possession south of the line 8 to B and in refusing the instruction asked upon the same subject a new trial is granted. New Trial.

J. P. LEACH v. L. D. JOHNSON.

Action to Enforce Contract for Purchase of Land—Vendor and Vendee—Defective Title—Judgment Liens—Homestead.

1. Where one contracts for the purchase of land without any agreement for a warranty of title and, thereafter and before the execution of a deed, encumbrances are discovered, he cannot be compelled to take the defective title or to pay the bonds given for the price of the land, for an agreement to take a deed without warranty is not a waiver of the right to demand a clear title.
2. Where a homestead was allotted to a judgment debtor on judgments docketed in 1873–1875, the lien of the judgments was not barred by the lapse of time in 1891.

ACTION on bonds given by the defendant to the plaintiff for the purchase of land, tried before *Shuford, J.*, and a jury, at Fall Term, 1892, of HALIFAX Superior Court.

There was judgment for the defendant, and plaintiff appealed.

The facts are stated in the opinion of Associate Justice CLARK.

Mr. Thomas N. Hill, for plaintiff (appellant).

Mr. R. O. Burton, for defendant.

CLARK, J.: The facts admitted by the parties or found by the jury are that the plaintiff, personally and not as agent for his wife, contracted to sell the land to the defendant for $1,435, of which $200 was paid in cash. Bonds were given by defendant for balance of purchase-money, plaintiff giving him an obligation to make a deed without warranty on payment of said bonds. The defendant did not know that there were judgment liens on the land, and before discovering them he paid in all $500 on the bonds.

After discovering such liens he refused to pay more. Thereupon plaintiff tendered him a deed executed by himself and wife and demanded payment. The defendant having refused to accept such deed and pay the balance of purchase-money, the plaintiff brought this action, in which his wife did not join. The title to the land was in the wife, subject to judgment liens. The jury further find that the value of the land at the time of the sale to defendant was $800.

A different principle applies in the case of the discovery of encumbrances before the execution of the conveyance and afterwards. This is supported by an unbroken line of decisions. 2 Warvelle on Vendors, 943. The reason is that after the deed has passed the vendee must rely on his covenant; but before it has passed the law will not compel a man to take a defective title, especially when he has not contracted for any warranty or has agreed to take the title without warranty. *Batchelor* v. *Macon*, 67 N. C., 181; *Miller* v. *Feezor*, 82 N. C., 192; *Hughes* v. *McNider*, 90 N. C., 252; *Cox* v. *Jerman*, 41 N. C., 526; *Howard* v. *Kimball*, 65 N. C., 175; *Motts* v. *Caldwell*, 45 N. C., 289; *Castleberry* v. *Maynard*, 95 N. C., 281; *Kilpatrick* v. *Harris*, 62 N. C., 222; *Clanton* v. *Burgess*, 17 N. C., 13.

Unless the vendee has otherwise agreed it is his undoubted right to demand a clear title. 1 War., *supra*, 315. That the vendee agreed to take a deed without warranty is not a waiver of the right to demand a clear title; on the contrary, the fact that a warranty in the conveyance is waived is all the stronger reason why the vendee should insist upon the cancellation of all liens and encumbrances, since he will have no warranty to fall back upon if the title should prove to be defective. The vendee in such case is not cut off from his rights till he has paid the purchase-money and taken the deed. The plaintiff contracted to sell his own title. He had none. He now offers that of his wife. He thus seeks to perfect a title, but when he does so he must not offer a defective one. *Herren* v. *Rich*, 95 N. C., 500. It is true the defendant contracted by bond to pay the amount sued for; but the consideration is recited to be the conveyance of this land. The obligation on the part of the plaintiff to execute a conveyance without warranty is not an agreement on the part of the defendant to take a defective title. The agreement is simply that if the purchase-money is paid and the deed accepted the vendee shall have action thereafter against the vendor if the title shall prove defective.

The homestead having been allotted, the lien of the judgments was not barred by the lapse of time when this deed was tendered nor when this action was tried, and the amount of such liens with interest and costs exceeded the value of the land as found by the jury.

No Error.

BOYKIN, CARMER & CO. v. W. J. MADDREY & SON.

Arrest and Bail—Breach of Trust—Fraudulent Intent—Evidence.

1. Where a firm of merchants gave to manufacturers of fertilizers their note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained.
2. The intent with which a breach of trust is committed is immaterial; and hence, where in the trial of an action for a breach of trust aided by the ancillary remedy of arrest and bail the plaintiffs, in

reply to the testimony of defendants that they intended no breach of trust, were permitted to introduce evidence of other breaches of trust by the defendants: *Held*, that such evidence was harmless, and its admission, upon the question of intent only, was not error.

3. Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, for all the purposes of arrest and bail, from such knowledge and act.

ACTION, tried at Spring Term, 1893, of NORTHAMPTON Superior Court, before *Hoke, J.*, and a jury.

The defendants were held to bail under an order of arrest which was granted on a complaint, used as an affidavit, alleging in substance that the defendants contracted for the purchase of one car load of commercial fertilizer from the plaintiffs and executed therefor their note for $416.25, agreeing at the time, and as a part of said contract of purchase, that they would deliver to the plaintiffs on or before the first of May following the notes of planters or other purchasers to whom they might sell said fertilizer for the gross amount of sales to be held by the plaintiffs as collateral security for the note of $416.25, and that they would hold all of said fertilizer, as also all proceeds therefrom, in trust for the payment of said note, and that they would apply all proceeds of said fertilizer, as collected by them, to the payment of said note, whether the same should have matured or not; that the defendants refused to pay said note, or any part thereof, and failed and refused to deliver to the plaintiffs any notes of planters or other purchasers of said fertilizer, or to account with them in any manner for the proceeds of sales of said fertilizer, or to furnish them with a list of their sales of the same and their collections; that the defendants sold said fertilizer and fraudulently applied the proceeds of sale to their own use, and refused to account with the plaintiffs for the same, in violation of the confidence and trust reposed in them by the plaintiffs, and which they assumed, and that the plaintiffs would not have sold to the defendants said fertilizer unless they had agreed, as they did do, to deliver to them the said notes of planters or other purchasers, and to hold all proceeds of sale in trust for the payment of their said note to the plaintiffs.

The defendants, answering the complaint, admitted the contract as set out in the complaint, but averred that the plaintiffs waived all compliance with the terms of the contract as regards the forwarding to them of farmers' notes and of holding proceeds from all sales in trust; that no demand was made on them for said notes but once, and at that time they had taken but few of the notes, and so informed the plaintiffs; that the custom of defendants in such transactions was not to remit the proceeds from said sales to plaintiffs as collected, but to cover the same into their general fund and use in their business, and when their notes given to close said purchase became due to pay the same from any funds on hand; that the plaintiffs had knowledge of this custom; that they gave their consent to the same and acquiesced in such a disposition of the proceeds from said sale and notes; that no demand was made on them for a list of said sales until after November 25, 1889, when they had assigned, and that then these defendants had been advised to take no steps in the matter until they had consulted an attorney; that all of said notes have been turned over to B. S. Gay, Esq., to be delivered to plaintiffs since such consultation, and all open accounts, liens and mortgages in which sales of such guano are included are in the hands of one S. N. Buxton, assignee of said defendant firm. They denied that they fraudulently applied the proceeds from such sales to their own use, and as to the delivery of said notes and holding proceeds in trust they alleged that the same was not a material inducement to said contract, and that in so far as the defendants may have failed to comply with said terms such failure was with the consent of plaintiffs and acquiesced in by them.

On the trial the following issues were submitted to the jury:

"1. Did defendants execute and deliver the note to the plaintiffs as alleged in the complaint?

"2. Have any payments been made by defendants on said note, and in what amount, and when?

"3. What amount is now due and owing plaintiffs on said note?

"4. Have defendants, or either of them, and if so, which one, embezzled and fraudulently appropriated to their own use property held by them in trust for plaintiffs, or held by them as agents, etc., under the contract, and applicable to payment of plaintiffs' debt?"

To which issues the jury responded as follows:

To the first issue, "Yes"; to the second issue, "Yes, $30, at beginning of suit"; to the third issue, "$387.50 and interest"; to the fourth issue, "Yes, as to W. C. Maddrey."

Plaintiffs introduced the contract entered into between themselves and the defendants in reference to the sale of the fertilizer furnished by them to the defendants, and also a note for $416.25, dated May 22, 1889, and due November 15, 1889, executed by defendants to plaintiffs, which covered the amount due for said fertilizer.

The plaintiffs next introduced the letters written by themselves to the defendants and the replies of the defendants thereto, from which it appeared that the plaintiffs had, from time to time, urged the defendants to comply with said contract by sending them the notes taken from farmers for the sale of said fertilizer, or any cash collected from said sales, and that defendants had deferred compliance by saying that the farmers were so busy that they had delayed taking their notes, but would send them forward as soon as they were executed.

Plaintiffs then rested.

Defendant W. C. Maddrey was introduced as a witness, and testified:

That defendants did not sell any of said fertilizer for cash, but sold to farmers on the idea that they would give their notes; the amounts were included with supplies sold them, and secured by mortgages, liens, etc.

That defendants made an assignment for the benefit of creditors on November 29, 1889, to S. N. Buxton, trustee, who was an uncle of the witness, in which it was first provided that several judgments recently obtained against the defendants, amounting to about $3,500, should first be paid, and the debts due to Eure, Farrar & Co., amounting to about $3,600, should be paid.

These plaintiffs were not secured in said assignment. Said assignment covered all the property of the firm and all the property, real and personal, of W. J. Maddrey, including all accounts and book accounts, and neither of defendants retained any of their homestead or personal property exemptions. The Sheriff was present with executions on said judgments at the time said assignment was made. Witness further testified that their assets at the time of the assignment, consisting of debts due the firm and the firm's property, amounted to considerably more than their liabilities, and that in making the assignment defendants desired to thereby gain time to have the debts due them collected and to prevent their goods being sacrificed under a forced sale; that he thought that enough could be collected to pay all their debts, and that they could begin business again: that Judge Eure, the secured creditor therein, had promised to advance the money with which to pay off the judgments in case they would secure him in the assignment, and that time would then be gained for collecting their debts, etc.

That witness had not intended that any of the notes or accounts due the plaintiffs should go into the trustee's hands for the general creditors preferred, but that they should be applied directly to plaintiffs' debt; that the trustee had demanded all the books and accounts, as well as the goods, and had taken charge of them; that witness thought trustee was entitled to them, but would have to account for them as stated; that afterwards trustee delivered up the guano notes, but not the accounts, to witness, and witness turned them over to Mr. Gay, his attorney, to be delivered to Mr. Mason, attorney for plaintiffs; that these notes amounted to $134; that this was done after the plaintiffs brought this action. Witness, before the assignment, had collected some amounts from farmers for the plaintiffs, and had turned it into his general business; that he had no intention at that time, or at any other time, of defrauding plaintiffs, but expected to pay off their note executed to plaintiffs for the fertilizer when it should fall due; that this had been their custom in dealing with other fertilizer companies for whom they acted as agents upon the same terms as for the plaintiffs, and that they had always paid up before this year; that the crops of that year were the shortest ever known, and they made an utter failure in collecting debts, in some cases collecting not more than $100 when $500 was due, generally collecting about five cents in the dollar, and defendants lost all they had made.

Witness further testified that his co-defendant, and father, W. J. Maddrey, had nothing to do with the management of the business, except in the way of advice.

There was testimony of other witnesses that the crops of the year 1889 were the shortest ever known. S. N. Buxton, the trustee, was a large merchant, had been in business for several years, and was a large dealer in fertilizers, and had dealt in them on similar terms as defendants with plaintiffs.

Defendants' counsel proposed to ask him, as a witness for defendants, if he was in the habit of paying over funds received from sales of fertilizers before his own note therefor was due, and whether or not he kept the money received from sales of guano separate from his other funds derived from mercantile business, with a view to showing that he did not keep them separate, but used them in his general business and settled with the guano companies when his own note became due. The Court refused to allow the question upon objection, and defendants excepted.

W. H. Ivey testified, after objection by defendants, that he had paid a note for $25.65 on November 6, 1889, to defendants for guano sold him by the defendants belonging to the Walton & Whann Guano Company. This evidence was introduced by plaintiffs upon the question of intent with a view of showing a fraudulent disposition of other moneys under like contracts, the defendant W. C. Maddrey having testified already that his firm was selling fertilizers for said company in 1889 under a contract similar to that between the plaintiffs and themselves.

Defendants objected to the admission of this evidence. The objection was overruled, and defendants excepted. Ivey said he owed $200 for guano bought that year still unpaid.

Other and similar testimony upon the question of intent was admitted under the objection of the defendants.

W. J. Maddrey testified that he took no active part in the business and knew nothing about it. W. J. Maddrey admitted that he used about $21 worth on his individual farm, and had not paid plaintiffs for any part thereof; that it was charged to him on the books of the defendant firm. It was in evidence by W. C. Maddrey that about $125 of the fertilizers were sold for cash, and some sold on account and included in liens given by defendants' customers for advancements to be made.

The plaintiffs asked in writing, in due time, the following instructions, which were refused, and plaintiffs excepted, to-wit:

"1. If the jury believe the testimony of W. C. Maddrey, they will answer the fourth issue, Yes.

"2. The fact that the year 1889 was a bad crop year ought not to enter into the consideration of the jury under the testimony in this case. (This prayer was asked in consequence of the fact that defendants' counsel had laid great stress upon the failure of the crops in 1889 as the reason why defendants failed to pay plaintiffs). When the defendants entered into the contract which has been offered in evidence they assumed a relation of trust and confidence to the plaintiffs, and it was their duty to hold the sales of the fertilizers which they received from the plaintiffs in trust for the payment of the note which they gave to the plaintiffs, and if the jury shall find that they have failed or refused to discharge said trust and confidence, or have applied said sales to other uses, or appropriated them to their own use, then the jury will answer the fourth issue, Yes.

"4. That nothing done by the defendants since the commencement of this action can enter into their consideration in arriving at their answer to the fourth issue.

"5. If the jury shall find that the defendants were in strained circumstances, which soon ended in insolvency, and the jury shall further find that while they were in those strained circumstances they appropriated the property entrusted to them by the plaintiffs to their own use, then the law presumes that their intent was fraudulent in thus appropriating it, and they cannot be heard to say that they had no intent by such appropriation to defraud the plaintiffs."

The defendants asked the following instructions, which were given, and plaintiffs excepted, to-wit:

"1. The plaintiffs must allege and prove that the money was fraudulently misappropriated, and if they fail to prove the fraudulent intent *at the time* the money was used in the general merchandise business, or otherwise, then they have failed to make out their case, and you should find the fourth issue, No.

"2. It must be distinctly proved that the defendants have acted with a felonious intent and have made an intentional wrong disposal, indicating a design to cheat and deceive the plaintiffs, before the defendants can be found guilty of fraudulently appropriating any property of plaintiffs.

"3. If at the time the defendants used any money that they may have collected for the plaintiffs they did not intend to defraud the plaintiffs, but intended to use it in their business, and to pay their notes when they should become due to the plaintiffs, then you should find the fourth issue, No."

The Court further instructed the jury as follows, to-wit:

"The burden of the fourth issue is upon the plaintiffs. The defendants admit the appropriation to their own business of so much of the guano as they sold for cash (about $125), and the question turns upon whether the appropriation, either here or in making the transfer of other assets, was done with a fraudulent intent."

Plaintiffs excepted.

"If such intent was absent the mere misappropriation with failure to repay would not inculpate, and the answer to issue four should be, No."

Plaintiffs excepted.

The jury found the fourth issue, "No, as to W. J. Maddrey," and there was a judgment thereon vacating the order of arrest as to W. J. Maddrey, and taxing plaintiffs with costs incident to the proceedings in arrest as to said W. J. Maddrey.

Plaintiffs moved for a *venire de novo* as to W. J. Maddrey on the issue of fraud.

For alleged errors in admission of testimony and instructions to the jury both plaintiffs and defendants appealed.

Messrs. Thomas W. Mason and *R. B. Peebles*, for plaintiffs.
Messrs. Benjamin S. Gay and *W. H. Day*, for defendants.

Burwell, J.: The plaintiffs brought this action to recover of the defendant firm, W. J. Maddrey & Son, a sum of money that they alleged was due to them from defendants, and which they had refused to pay. What amount was so due to the plaintiffs was ascertained at the trial to the satisfaction of both parties, it seems, for no objection is made to the judgment rendered so far as it declares the indebtedness of defendants to plaintiffs. These appeals concern, not the main action, but the ancillary remedy of "arrest and bail," the aid of which the plaintiffs invoked in order the better to secure the fruits of their recovery.

In *Travers* v. *Deaton*, 107 N. C., 500, it is said of paragraph 2 of section 291 of *The Code*: "This provision is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases where the relation of trust and confidence in respect to money received by or personal property in the possession of one party for the benefit of another is raised and exists between such parties by reason of their contract express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff." In that case, as well as in the cases of *Chemical Co.* v. *Johnson*, 98 N. C., 123, and *Powers* v. *Davenport*, 101 N. C., 286, it was decided that where between the plaintiff and defendant there was such a contract as in this case is admitted to exist between the parties, a fiduciary relation was created, and that a violation of such a contract by defendants was a breach of trust. Inasmuch, then, as this action is founded upon an alleged violation of such a contract—a breach of trust—it follows that the plaintiffs, having made proper affidavits and given the required undertaking, had a right to an "order of arrest" for the defendants.

According to the provisions of section 316 of *The Code*, as amended by the Act of 1889, ch. 497, the following issue was submitted to the jury: "Have defendants or either of them, and if so, which one, embezzled and fraudulently appropriated to their own use property held by them in trust for plaintiffs, or held by them as agents, etc., under the contract, and applicable to the payment of plaintiffs' debt?" To this issue the jury responded, "Yes, as to W. C. Maddrey," and the Court refused to vacate the order of arrest as to W. C. Maddrey, and because of such refusal he appeals from that judgment, alleging error in the admission of testimony. We will first consider and dispose of his appeal.

The evidence, to the introduction of which he objected, tended to show that he had conducted himself, in his dealings with others towards whom he stood in the same relation as he did towards the plaintiffs, just as he had done toward them — that he had disposed of other property besides that of the plaintiffs in violation of the contracts under which he held it — that he had committed other breaches of trust similar to the one charged against him in this action and about the same time.

The record discloses the fact that the defendants were allowed, over the objection of the plaintiffs, to offer testimony to show that, when they did the acts complained of, they had no intent to defraud the plaintiffs; and it was in reply to that evidence as to intent that the plaintiffs offered the evidence to which the defendants objected. His Honor admitted it for that purpose only, and cautioned the jury to consider it on that question alone.

If the intent with which a trustee commits a breach of trust were at all material in such an inquiry as this, authorities might be found to sustain the ruling of which this defendant complains. But we need only say here that his intent was entirely immaterial. The law gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee, by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness, and it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. Doing such wrong is, in such a case, incompatible with meaning to do right. The assertion of an intention to replace the fund is an admission of consciousness that its use was a misapplication. Good intentions do not at all lessen the wrongfulness of a breach of trust, or, rather, the law will not allow one to say that he violated its plain precepts with good intentions. Therefore, the ruling of which the defendant complains was harmless.

And, indeed, so far as the record discloses, there was no evidence whatever introduced by the defendants to show any cause for the vacating of the order of arrest as to W. C. Maddrey. All the evidence went to show that he had committed a breach of trust, his conduct being judged by the principles established by the cases cited above, which must control us in the consideration of causes such as this one.

From what has been said it follows not only that there was no error in that of which the defendants complain, but also that there was error in that of which the plaintiffs complain—the vacating of the order of arrest as to W. J. Maddrey.

It is true that one partner cannot be arrested for the fraud of his co-partner of which he had no knowledge and at which he in nowise connived. *McNeely* v. *Haynes*, 76 N. C., 122. Hence if upon the re-trial of the issue of fraud as to W. J. Maddrey it shall appear that the breach of trust committed by the firm of which he was a member was in fact done by his co-partner without his knowledge, assent or connivance, then the order should be vacated as to him. The firm of W. J. Maddrey & Son assumed towards the plaintiffs a fiduciary relation as to the property committed to them under this contract. Did W. J. Maddrey know of this contract? The law presumes that he did. Did he know that the managing partner was disposing of this property and the proceeds of its sale in a manner that was violative of its provisions? Did he assent to or connive at such conduct? When he joined his co-partner in the execution of the assignment to S. N. Buxton, trustee, did he know or did he have reasonable ground to believe that by that assignment the firm was transferring to that trustee effects that should have been applied to the use of the plaintiffs? If he had this knowledge the act of misappropriation by his co-partner became his act, and his intent to commit a breach of his trust is conclusively presumed for all the purposes of this remedy of arrest and bail from such knowledge and such act.

The instruction which the plaintiffs asked should have been given, while those asked by defendants should have been refused. It is adjudged that there was, in the defendants' appeal, no error. In plaintiffs' appeal it is adjudged that as to W. J. Maddrey there shall be a

New Trial.

ELIZABETH DIXON, Administratrix of J. P. Dixon, v. W. E. ROBBINS AND WIFE.

Mortgage—Privy Examination of Wife of Mortgagor—Mortgage of Land Without Joinder of Wife of Mortgagor—Homestead.

1. The privy examination of a wife, as to the execution by her of a deed, taken in one county by a Justice of the Peace resident in another county, is invalid.
2. The privy examination of a wife of a grantor of land is not necessary to bar the contingent right of dower in land where the marriage took place in 1857 and the land was acquired in 1861.
3. A mortgage of lands by one indebted at the time bars any homestead right therein without the joinder and privy examination of the wife, if the homestead had not been allotted and there were no docketed judgments upon which the homestead could be allotted.

ACTION to foreclose a mortgage, tried before *Hoke, J.*, and a jury, at Fall Term, 1893, of WILSON Superior Court.

The defendants resisted the sale of the lands conveyed in the mortgage upon the ground that the conveyance was inoperative because the wife did not join in the same.

In response to the issues submitted on the trial the jury found that the homestead in the lands had not been allotted when the mortgage was made; that the male defendant was then embarrassed with debts which he has not paid off; that there was one docketed judgment against him at the time which is now held by the plaintiff, who offers to cancel the same; that the defendants were married in 1857, and that one of the two tracts of land conveyed in the mortgage was acquired in 1861, and the other in 1880; and that the Justice of the Peace who took in Nash county the privy examination of the wife as to the execution by her of the mortgage was a resident and Justice of the Peace of Edgecombe county.

Judgment was rendered against both the defendants for the sum demanded in the complaint and for the sale of the lands—the tract acquired in 1861 to be sold free from any claim of homestead, and that acquired in 1880 to be sold subject to the contingent right of dower of the *feme* defendant. From this judgment the defendants appealed.

Mr. D. Worthington, for defendants (appellants).
No counsel *contra*.

CLARK, J.: The privy examination of the wife taken in Nash county before a Justice of the Peace of Edgecombe was invalid. *Williams* v. *Kerr*, 113 N. C., 306, *Ferebee* v. *Hinton*, 102 N. C., 99. The sixty-five-acre tract of land was acquired in 1861, and the fifty-acre tract in 1880, while the marriage was in 1857. His Honor properly held that no privy examination was necessary to bar the contingent right of dower as to the first tract, and that as to the latter the sale under foreclosure was to be made subject to such contingent right. *Castlebury* v. *Maynard*, 95 N. C., 281. The homestead had not been allotted in these lands when the mortgage was made, hence the wife's joinder in the deed was not necessary to bar the homestead right therein, although the grantor was indebted at the time. *Hughes* v. *Hodges*, 102 N. C., 236. It is true that decision holds that the conveyance to bar homestead would not be good without the wife's signature and privy examination when there was a docketed judgment upon which the homestead could be allotted, but here the only docketed judgment, when the mortgage was executed, is held by the mortgagee, the plaintiff in this action, who offers on the trial to cancel said judgment. It was doubtless merely an inadvertence that judgment was rendered against the wife personally for the amount of the debt. *Pippen* v. *Wesson*, 74 N. C., 437. In that respect the judgment must be modified.

Modified and Affirmed.

WALTON & WHANN COMPANY v. W. J. DAVIS, Trustee.

Pledgee of Note Secured by Mortgage—Rights of, as against another similarly secured held by the mortgagee or his trustee—Assignment for Benefit of Creditors.

R. & Co., holding a mortgage to secure a note and advances made and to be made, transferred the note before maturity to plaintiff as collateral security, and thereafter made an assignment to the defendant of all their property, including the mortgage, for the benefit of creditors. The mortgagors delivered a part of the crop covered by the mortgage to the defendant, who converted the same into money: *Held* (1), that the defendant assignee in respect to such transaction succeeds only to the rights of R. & Co., his assignors; (2), that plaintiff, assignee of the note, is entitled to have the money applied on the note in preference to the account for advances.

CONTROVERSY submitted without action, under sections 567–569 of *The Code*, and heard before *Hoke, J.*, at Fall Term, 1893, of WILSON Superior Court, upon an agreed statement of facts substantially as follows:

On February 16, 1893, William Griffin and others executed to M. Rountree & Co. a mortgage whereby they conveyed to the latter, besides other property, the crops to be made during the year 1893 on certain lands therein described to secure said R. & Co. for advances to be made to the mortgagors to enable them to cultivate a crop upon said lands, and also to secure a note for $312.91 due R. & Co. from the mortgagors. Subsequently Rountree & Co. indorsed the note to the plaintiff as collateral security for certain indebtedness, and thereafter made a general assignment of their property, including accounts due them for advances, to the defendant for the benefit of creditors. After the assignment the Griffins delivered to the defendant Davis, assignee, certain cotton, part of the crops covered by the mortgage, which the said defendant converted into money and the proceeds of which he holds, claiming that he has the right to apply the same in part payment of the account due for advances. The plaintiff, on the contrary, claims that such proceeds should be applied to the credit of the note of $312.91.

His Honor held with the plaintiff, and the defendant appealed.

Messrs. W. C. Munroe and *J. F. Bruton*, for plaintiffs.
Messrs. Woodard & Yarborough, for defendant (appellant).

SHEPHERD, C. J.: We are entirely satisfied that the assignee, in respect to this transaction, succeeds only to the rights of M. Rountree & Co., his assignors, and that the case is to be determined by the same principles which would be applicable if there had been no assignment. *Wallace* v. *Cohen*, 111 N. C., 103; *Southerland* v. *Freemont*, 107 N. C., 565; *Woodruff* v. *Bowles*, 104 N. C., 211. This being so, we are of the opinion that the doctrine laid down in *Whitehead* v. *Morrill*, 108 N. C., 65, is decisive of the question before us and fully sustains the ruling of the Court below. The mortgage executed by the Griffins secured the payment of a note of $312.91 due by them to M. Rountree & Co., and also advances to be made by the said firm. All of this indebtedness was payable on the first of November, 1893, but before this date the said M. Rountree & Co. indorsed the note to the plaintiffs, who for the purposes of this action must be regarded as purchasers for value. By reason of this indorsement the said M. Rountree & Co. became liable to the plaintiffs, and as the other indebtedness is still in their hands (or, what is the same thing, in the hands of their assignee) the case very plainly falls within the principle of *Whitehead* v. *Morrill*, *supra*. If it be conceded that the mortgage as to the advances is to be treated as an agricultural lien (*Townsend* v. *McKinnon*, 98 N. C., 103), and therefore entitled to priority as against the adverse liens of other persons, we do not see how this can militate against the conclusion we have reached. The amount of the advances thus secured was, like the note, due the said Rountree & Co., and as between them and the indorsers of the note its payment was, upon the principle of Whitehead's case (*supra*), postponed, and it is immaterial whether it was entitled to priority over the claims of third parties.

Affirmed.

CITY NATIONAL BANK OF NORFOLK v. J. R. BRIDGERS et al.

Certiorari—Intentional Omission by the Judge of Irrelevant Facts in Case Settled—Practice.

A *certiorari* will be denied where it does not appear that the matters omitted from the case settled are relevant to the exceptions presented on appeal or were omitted by mistake or inadvertence of the Judge below, although the latter is willing to supply the omission.

Messrs. J. W. Hinsdale, W. H. Day and *Alex. Stronach,* for petitioner.

Mr. R. B. Peebles, contra.

PER CURIAM: It appears that when the Judge settled the case on appeal he declined to send up the additional matters now asked for by the motion for *certiorari,* and that he did this on the ground that such matters had no relevancy to the exceptions presented upon the appeal. This Court has always discouraged encumbering the record and increasing the costs by sending up irrelevant and redundant matter. *Durham* v. *Railroad,* 108 N. C., 404. It does not appear that the Judge has changed his mind, but simply that he will, as counsel insists on it, send up the excluded matter if this Court desires it. When it appears that matter material and pertinent to the appeal has been omitted from the "case settled" by the mistake or inadvertence of the Judge, and it further appears that the Judge is able and willing to correct the mistake, the Court will by *certiorari* give the Judge an opportunity to amend the case on appeal. *Boyer* v. *Teague,* 106 N. C., 571. It will not even then direct him to do so, but merely give him the opportunity. *Clark* v. *Currie,* 90 N. C., 17. It is true it appears here, as is essential (*Porter* v. *Railroad*, 97 N. C., 63), that the Judge is willing to amend the case, but it does not appear that the additional matter is material or relevant, nor that it was omitted by mistake or inadvertence (*State* v. *Sloan*, 97 N. C., 499), but the contrary. The *certiorari* must therefore be denied. Clark's Code, second edition, pp. 549 and 706.

Motion denied.

F. SITTERDING v. J. M. GRIZZARD AND T. T. GASKINS.

Contract—Vendor and Vendee—Option—Abandonment.

1. S. agreed to buy and pay cash for certain tracts of timber land which G. might thereafter contract for to the extent of $4,000, G. agreeing to take the same at an advance of fifteen per cent. at the expiration of one year, and in the meanwhile to cut and sell the timber: *Held*, that the contract established between S. and G. the relation of *vendor* and *vendee* and was not an *option;* the obligation being mutual, neither could escape its force without the consent of the other.
2. Where one party to a contract relies upon a renunciation of it by the other the burden is upon him to show by positive and unequivocal proof not only that the other party abandoned the contract but that he himself accepted the renunciation.

CIVIL ACTION, tried before *Bynum, J.*, and a jury, at Fall Term, 1893, of HALIFAX Superior Court. The plaintiff sought to recover possession of certain lands bought by defendant Gaskins for him under the contract set out in the complaint, and also to have the rights of the said defendant in said lands foreclosed and the appointment of a receiver, who should sell the lands, betterments, etc., and hold the proceeds subject to the final adjudication of the rights of the parties. The contract was as follows:

"This contract, made and entered into this 23d day of March, 1891, between F. Sitterding, of Richmond, Virginia, of first part, and T. T. Gaskins, of Greenville county, Virginia, of second part, witnesseth:

"That F. Sitterding agrees to buy and pay cash for certain tracts of timber adjacent to each other in the county of Halifax, North Carolina, which the said Gaskins has or may hereafter contract for to the extent of four thousand dollars, and that the said Gaskins agrees that at the expiration of twelve months from April 1, 1891, he will take the said tracts of timber off of his hands at an advance of fifteen per cent. on the price paid by the said Sitterding.

"It is agreed that Sitterding shall have all the timbered lands purchased by him under this contract thoroughly examined, both as to title and quantity of timber estimated to be on the land, and that the said Gaskins shall pay for all costs incurred in the said examination, and also for the writing and recording of all deeds and papers connected with the transactions.

"It is agreed that the said Gaskins may proceed at once to cut and manufacture said timber into lumber, provided, however, that all of said lumber shall be sold or handled through A. L. Shepherd & Co., who shall deduct one dollar per thousand on each and every thousand manufactured, to go as a credit on whatever sum which may have been paid out by said Sitterding, and which shall go as a credit on the amount to be paid by said Gaskins on first day of April, 1892.

"And it is further agreed that so soon as the purchase of timber has been completed that this contract shall be re-written so as to give description of the timber above referred to.

"Witness our hands and seals, this 7th day of April, 1891.

"F. SITTERDING, [Seal.]
"T. T. GASKINS, [Seal.]"

The time for the payment of the purchase-money by the defendant Gaskins was extended to April 1, 1893, and again to May, 1893. Although large quantities of lumber were shipped to Shepherd & Co. no part of the proceeds of its sale was paid to the plaintiff, who neither assented to nor dissented from the non-payment of the one dollar per thousand feet which the contract provided should be paid to him. Gaskins obtained supplies and advancements of money from Shepherd & Co., and statements of his account were regularly sent to the defendant, so that he knew that the one dollar per thousand feet of lumber was not paid to plaintiff. In January, 1893, plaintiff wrote to Gaskins that the matters between them could not remain any longer in an unsettled condition, and thereupon defendant went to Richmond, and, in a conference between them and Shepherd & Co., it was agreed that the matters should be closed up by April 1, 1893, and in case defendant should not be able to get other parties to buy the lands his rights under the contract should be at an end. On the 28th of March, 1893, defendant wrote a letter to plaintiff saying that on account of delays he could not settle by the first of April, 1893, and added, "so I write to say that while I, of course, consider the option legally at an end on April 1, 1893, I beg that you will permit me to go on with my negotiations and make such arrangements to the end that you shall, before long, have your money. I will not cut another tree after first of April, but want to go on and saw up what logs are on the skidways, which will the better enable me to square up with you and Mr. Shepherd." To the request contained in the letter the plaintiff acceded, being assured that the defendant could make his arrangements to settle in a few days. Shortly thereafter, without notice to the plaintiff, Gaskins executed a deed of trust to the defendant Grizzard, conveying his interest in the lands, saw-mills, tramway, lumber, etc.

On the trial there was verdict and judgment for the defendants, and plaintiff appealed.

Messrs. R. O. Burton and *Mullen & Daniel*, for plaintiff (appellant).

Messrs. Thomas N. Hill and *W. H. Day*, for defendants.

BURWELL, J.: The contract set out in the second paragraph of the complaint, the execution of which is admitted, established between the plaintiff and the defendant Gaskins the relation of vendor and vendee. It is not an "option." It does not provide that the plaintiff will convey *if the said defendant elects to pay a certain sum on or before a certain day.* It binds both parties—the one to sell and convey, and the other to accept the deed and pay for the property. The obligation being mutual, neither can escape its force without the consent of the other. Time is not of the essence of such a contract. The vendee thereunder, in possession, has the rights of a mortgagor, while those of the vendor are similar to the rights of the mortgagee.

There is no dispute about what property is covered by this agreement, and the price is fixed by reference to its cost, and the latter is established by the deed made to the plaintiff.

We find in the record no evidence sufficient to establish an abandonment of this contract by the defendant Gaskins. What amounts to such an abandonment was a matter of law to be determined by the Court. *Dula* v. *Cowles*, 7 Jones, 290. "The acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract." *Fair* v. *Whittington*, 72 N. C., 321; *Miller* v. *Pierce*, 104 N. C., 389. If the plaintiff relied upon a renunciation of the contract by the defendant Gaskins it was his duty to make it out unmistakably, and also that he himself had accepted that renunciation and agreed expressly or impliedly to release the defendant from his obligation. There was some evidence that the defendant considered that he had only "an option" to purchase. There was no sufficient evidence, we think, that plaintiff abandoned or waived any of his rights under the agreement. Hence, both are still bound by its provisions. The defendants insist that the vendee Gaskins has paid a part of the purchase-money. They seem to concede that the plaintiff never in fact received any payment either from the hands of Gaskins or from the hands of A. L. Shepherd & Co., and indeed there seems to be no dispute about the facts relating to this part of the controversy. Gaskins shipped to A. L. Shepherd & Co. a large amount of lumber under the contract; they did not pay to the plaintiff the sum (one dollar for each one thousand feet) which the contract provided they should reserve for that purpose; the plaintiff did not expressly assent to this nor did he dissent; Shepherd & Co. rendered statements to Gaskins from time to time which showed that they had applied to his use all the proceeds of the lumber, and that they had not reserved any sum for plaintiff; he did not object, though he examined the accounts. We merely state the facts and our conclusions that no payment whatever seems to have been made to the plaintiff on account of the purchase-money.

From what has been said it follows that there is really no issue of fact between the parties as the matter is presented in the record before us. The costs of all the property bought by the plaintiff under the contract prior to April 1, 1892, should be ascertained. To that amount should be added fifteen per cent. The plaintiff is entitled to recover of the defendant Gaskins that sum, with interest thereon from April 1, 1892, and also whatever has been expended by him in purchases since that date, with fifteen per cent.

added, and interest on the cost of each purchase from its date, and a decree of sale should be entered and the proceeds applied according to the rights of the parties.

Error.

P. D. B. ARRINGTON v. J. P. ARRINGTON et als.

Practice—Notice of Appeal—Time of Service.

1. Where appellant's counsel, five days after the adjournment of Court, mailed by registered letter notice of appeal, statement of case, and copies and fees to the Sheriff of the county at the county-seat, so as to leave ample time for service on appellee's counsel, who resided at that place, the failure of the Sheriff to take the notice, etc., from the post-office until after the ten days allowed for service cannot be imputed to the appellant as his laches.
2. In such case, where the facts are not disputed, the case will be remanded and the appellee will be allowed five days after the certificate of this Court is filed in the Court below to file exceptions to the appellant's case on appeal *nunc pro tunc*, and in default of an agreement the Judge who tried the cause will settle the case.

Motion to dismiss the appeal of the defendant Nancy Bunn from a judgment rendered in an action tried before *Shuford, J.*, at Fall Term, 1893, of Vance Superior Court.

Messrs. Battle & Mordecai, for appellant.
Mr. R. B. Peebles, contra.

Clark, J.: The judgment was rendered at a term of Court which adjourned June 3, 1893. On June 8, 1893, counsel for appellant, Nancy Bunn, caused notice of appeal to be entered, and mailed from Rocky Mount, by registered letter, notice of appeal and statement of case on appeal, with copies and fees for service, to the Sheriff of Northampton county, at Jackson, the county-seat. The appellees' counsel resided in that town and there was ample time to have served the papers before the expiration of the ten days, "which, excluding the first day and including the last" (*The Code*, §596), would have expired 13th June at midnight. The ten days is to be computed not from the day judgment was rendered, but from June 3, the day on which Court actually adjourned. *Turrentine* v. *Railroad*, 92 N. C., 642; *Walker* v. *Scott*, 104 N. C., 481; *Chamblee* v. *Baker*, 95 N. C., 98; *Worthy* v. *Brady*, 91 N. C., 265. The appellant was guilty of no laches. The letter was properly addressed to the Sheriff at the county-seat. *Yeargin* v. *Wood*, 84 N. C., 326. It was not the neglect of appellant that the Sheriff to whom the letter was addressed did not take it out of the office till June 17th.

If the facts were controverted the case might be remanded to the Judge below to find the facts, but being undenied it is clear that no laches is imputable to appellant. The case is remanded to the Superior Court of Vance County. Following the precedent in *Walker* v. *Scott*, 104 N. C., 481, the appellees will be allowed five days after the certificate of this opinion is filed in the office of the Clerk of the Superior Court of said county, to file their exceptions, should they desire to do so, to the appellant's case on appeal *nunc pro tunc*, and if the parties cannot agree upon a statement of the case it will be settled by his Honor who tried the case (Judge Shuford), under the requirements of *The Code*, §550. Remanded.

P. D. B. ARRINGTON v. B. L. AND J. P. ARRINGTON, Executors.

Practice—Appeal—Counter-case, service of—Settlement by Judge.

1. Where appellant's case on appeal was served within the time prescribed on the appellee, who thereupon mailed his counter-case, with fees, to the Sheriff of the county where appellant's counsel resided, and the Sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post-office until too late, no laches can be imputed to the appellee.
2. Where appellant's failure to send appellee's counter-case to the Judge to settle was caused by the fact that it was served too late the case will be remanded to the Judge for settlement.

This was an APPEAL by defendants S. L. and J. C. Arrington from a judgment of the Superior Court of VANCE County rendered in an action tried at Fall Term, 1893, before *Shuford, J.*

Mr. R. B. Peebles, for appellants.
Messrs. Battle & Mordecai, contra.

CLARK, J.: Let it be conceded that the agreement to extend time to serve case and counter-case on appeal applied only if the judgment had been rendered in vacation. The appellants' case on appeal was served on appellee's counsel on June 10, 1893, within the regulation ten days after adjournment of the term at which the judgment was rendered. On June 12, 1893, the said statement of case with appellee's exceptions thereto, with copies and fees, was mailed by appellee's counsel to the Sheriff of Northampton county, in which appellants' counsel resided, in a registered letter addressed to said Sheriff at the county-seat. This was the official residence of the Sheriff, and in due course of mail he should have received the letter in ample time to have served the papers personally on appellants' counsel or by leaving the same at his office or residence (*The Code*, §597 (1); *State* v. *Price*, 110 N. C., 599) within the statutory five days. By some chance the Sheriff did not take the papers out of the office at Jackson till June 17th. Here there was no laches on the part of the appellee. *Yeargin* v. *Wood*, 84 N. C., 326; *Walker* v. *Scott*, 104 N. C., 481. Ordinarily, if on receipt of appellee's counter-case appellant does not send the case to the Judge to settle, he will be taken to have accepted the appellee's modifications of the case. *Russell* v. *Davis*, 99 N. C., 115. But here the appellant's failure to do so was caused by his *bona fide* contention that appellee's exceptions were served too late. Hence the case will be remanded "to be settled by the Judge who tried the cause." *Russell* v. *Koonce*, 102 N. C., 485; *Mitchell* v. *Haggard*, 105 N. C., 173.

Remanded.

PATTIE D. B. ARRINGTON v. W. H. ARRINGTON.

Action for the Recovery of Land—Pleading—Proof—Husband and Wife—Presumption of Gift.

1. Where the complaint in an action to recover land alleges title and right of possession in the plaintiff, proof that plaintiff is the owner of the equity of redemption in the land will permit a recovery as against a mere trespasser.

2. Where a husband with his own money purchases and improves land, putting the title in the wife, there is no resulting trust in favor of the husband, but a gift to the wife, both of the land and the improvements, is presumed from the relation of the parties.

3. In an action to recover land the plaintiff must have the right to the possession not only at the institution of the suit but at the time of

the trial also; hence, in the trial of such an action, where it appeared that the plaintiff had at the commencement of the action only an equity of redemption in the land, it was error to exclude testimony tending to show that between the commencement of the action and the trial the plaintiff had lost her equitable title.

ACTION to recover possession of land, commenced in Wayne county and removed by consent to NASH, where it was heard at the November Term of the Superior Court, 1893, before *Hoke, J.*, and a jury. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. F. S. Spruill and *E. W. Timberlake*, for defendant (appellant).

No counsel *contra*.

BURWELL, J.: It appears from the pleadings and the "case on appeal" that there is little or no dispute between the parties about the facts upon which each of them claims the land described in the complaint.

In 1875 the plaintiff was the wife of the defendant. In 1880, in the State of Illinois, she was divorced from him *a vinculo matrimonii.* In July, 1891, she brought this action to recover the land in controversy, of which the defendant had possession. It comprised two tracts, one containing one and one-half acres and the other three and one-half acres. On the first tract the defendant had put houses and other improvements to the value of about $1,600. This was done while the plaintiff was his wife.

The defendant testified that he bought both of the tracts; that he paid for the first named tract with "funds of his wife, or which came from her estate," which money he said was his own *jure mariti*, he and she having married before 1868. The second tract he paid for with his own money. The title to these lands was made to plaintiff in fee-simple.

and the defendant's explanation of this fact is: "The money came by her, and for this reason I caused title to be made to my wife as a home for us both." There was no contradiction of this evidence.

It appeared on the trial that on the 6th day of November, 1890, the plaintiff had executed a mortgage to W. J. Harris and J. W. Crowell, which was duly registered on November 11, 1890. This deed conveyed to the mortgagees the first or one and one-half acre tract to secure the payment of a note for fifty-two dollars due January 1, 1891, and contained the usual power of sale in case of default.

Three of the contentions of the defendant may here be disposed of:

1. The mortgage to Harris and Crowell being unsatisfied when this action was brought, the plaintiff had only an equitable title to the land thereby conveyed. But she could recover upon it according to the well-settled rule in this State. *Condry* v. *Cheshire*, 88 N. C., 375. In her complaint she alleged title and right of possession, and proof that she was the owner of the equity of redemption would be admissible under such allegations against a trespasser. More specific pleadings are necessary to recover upon an equitable title in certain cases, and the rule as to that is stated in *Geer* v. *Geer*, 109 N. C., 679. His Honor therefore properly ruled that the plaintiff, though she was the owner only of the equity of redemption, could recover of the defendant, who, as far as appeared, was a mere trespasser, not claiming the legal title or that he held under the owners of that title.

2. It was also properly held that there was nothing whatever to support the contention of the defendant that the plaintiff and her heirs had been invested with the title to the land in dispute to hold it in trust for the defendant and his heirs, or for the plaintiff and defendant jointly. For,

while it is true that when the title to land is taken to one person and the purchase is paid by another there is as a general rule a resulting trust in favor of the latter, that doctrine has no application where, as here, a husband purchases land and pays for it, but puts the title in his wife. In such case the wife holds the land as a gift and not in trust. This is presumed from the relation of the parties. There was nothing here to rebut that presumption or in anywise to restrict the effect of the deeds made to her.

3. Improvements put by the husband on his wife's land must also, and for the same reason, be considered as a gift from her to him. It was properly held that the value of such improvements was not chargeable on the defendant's land.

We come now to the consideration of the defendant's exception to the exclusion of testimony offered by him to show that default had been made by plaintiff in the payment of the note secured by the mortgage hereinbefore mentioned; that pursuant to the terms of that mortgage a sale of the first or one and one-half acre tract was made on the first day of August, 1892, when one Green became the purchaser and a deed was made to him, it being admitted, as stated in the case, that "the mortgage and deed are in due form; that the notice was given and the sale made after due compliance with the requirements of the statute and the provisions of the mortgage."

The facts that he thus offered to show were set out in the defendant's answer which, owing to some delay in the filing of the pleadings, seems not to have been made until after August, 1892, the date of the alleged sale.

The evidence which had been admitted—the mortgage of 1890—showed that when the plaintiff began her action she did not have the legal title to the one and one-half acre tract but only an equitable title thereto, to-wit, an equity of redemption. The proffered and excluded evidence tended to show that the plaintiff, between the commencement of the action and the trial, had lost her equitable title and then had no right whatever to the possession of that tract. It should not have been excluded, for in an action to recover land the rule is that the plaintiff must have the right to the possession not only at the institution of the suit but at the time of trial also. This is said by Lawson (Rights & R., Vol. VII, sec. 3708) to be almost the universal rule, the only exception thereto being in Vermont, as he says in his note referring to *Edgerton* v. *Clark*, 20 Vt., 264. That case does not sustain the statement of the learned author that it is an exception to the rule. It only decides that a plaintiff in such an action, who has title to the demanded premises at the commencement of his suit, and at the *time of trial*, is not precluded from recovering by the fact that there has been an intervening period during which he has by his own acts been divested of all title. It has been repeatedly decided by this Court that, in such actions as this, damages are recoverable up to the time of the trial, and not only to the beginning of the suit, as under the former practice. *Pearson* v. *Carr*, 97 N. C., 194. This rule would seem to require the admission of such evidence as the defendant tendered, and which was excluded, for the plaintiff would surely not be entitled to damages on account of the unlawful withholding possession of this tract for a time beyond the duration of her own title to it. Because of the exclusion of this evidence there must be a

New Trial.

L. B. ALLEN v. P. ALLEN et als.

Action for the Recovery of Land—Equitable Defences—Issues.

1. In the trial of an action it is the duty of the Judge to submit such issues arising on the pleadings as will present the whole matter in controversy and allow the introduction of all material evidence, and on the responses to which the Court will be able to pronounce judgment on the merits.
2. Where, in an action for the recovery of land, the answer of the defendants set up equities on which substantial relief was demanded, and the plaintiff, in his reply, admitted a contract between himself and defendant's intestate for a sale of the land to the latter, and an interchange of a bond for the purchase-money and a bond for title, and averred his willingness to make title upon the payment of the bond for the purchase-money, which defendants alleged had been paid in full: *Held*, that it was not error to refuse to submit issues tendered by the plaintiff having no reference to the equities set up, but the Court properly submitted such as directed the attention of the jury to the question whether the purchase-money had been paid in full or in part.
3. Where, on the trial of an action, testimony prejudicial to the one side or the other is admitted but is withdrawn from the jury with all necessary cautions and no injury could have resulted from its introduction, a new trial will not be granted.
4. A bond to plaintiff by defendant's intestate found among the latter's papers, purporting to be for a balance due on the price of land, and containing a statement that upon its payment the payee should execute a deed to the maker, was admissible to prove payment, to the extent of the amount of the note, of an earlier and larger bond given for the price of the land, when accompanied by evidence of its presentment to plaintiff and of his declarations that the land had been paid for and that a credit indorsed on the note was a payment on the land, together with evidence that there was only one land transaction, although the description of the land in the bond so found was insufficient.

This was a CIVIL ACTION, tried at October Term, 1893, of VANCE Superior Court, before *Hoke, J.*, and a jury.

To condense the pleadings as far as practicable: The plaintiff brought his action against the widow and heirs of D. S. Allen, alleging title and seeking to recover possession of the tract of land described in the complaint. He further alleges that said land formerly belonged to one J. J. Hayes, and was purchased from him by plaintiff and D. S. Allen jointly, in 1869, for $2,000, and that plaintiff subsequently bought the interest of D. S. Allen in said land, and that, after the death of J. J. Hayes, his administratrix, at the request of D. S. Allen, executed and delivered a deed for the land in fee-simple to plaintiff, said deed having been drawn and witnessed by said D. S. Allen; and plaintiff demands judgment that he is the owner in fee-simple and entitled to immediate possession of the land, and if necessary that the heirs of J. J. Hayes be made parties and decreed to make title to him; and for such other relief, etc.

Defendants admit possession in themselves and deny that the same is wrongful; they admit the joint purchase of the land from J. J. Hayes, the death of Hayes, and the execution of the deed to plaintiff by the administratrix, but they deny her right to make a valid conveyance of the same; they aver that D. S. Allen paid at least half of the purchase-money for the land—a part of the same to the administratrix—and they deny that he sold his interest in the same to plaintiff; they aver that Allen used $1,000 of his wife's money in payment for the same, and aver that the deed was made to plaintiff that he might hold the land as security for the payment by Allen to plaintiff of the price of plaintiff's interest in the land which Allen bought from plaintiff, and that Allen in his life-time fully paid to plaintiff the said price; they claim the right to have a deed from the heirs of J. J. Hayes, or if the deed from Hayes' administratrix conveyed title to plaintiff they assert their right to a conveyance in fee-simple of the whole tract from him, and they ask that if necessary the heirs of Hayes be made parties and decreed to make title to defendants.

Plaintiff in his reply denies the payment by Allen of one-half the purchase-money with his own funds or with the funds of his wife, and denies the allegations of the complaint as to the equities set up that plaintiff holds the land in trust for them. He proceeds: "But plaintiff admits and alleges that on March 15, 1874, he contracted to sell to said D. S. Allen the said tract of land, with the stock on it, at the price of $2,944.62, and obligated himself in writing to convey the land to said Allen in fee whenever Allen should pay to him said sum, with interest thereon at the rate of eight per cent. per annum from the first day of January, 1875; and plaintiff further avers, that on said March 15, 1874, said Allen executed and delivered to plaintiff his (said Allen's) bond, whereby and wherein he promised to pay to plaintiff the said sum and interest as aforesaid for said land and stock," describing the land and offering to produce the bond. "And plaintiff says that he is now willing and has at all times since the execution of said bond by himself and D. S. Allen been willing and ready to convey to Allen in fee said tract of land upon his paying to him said sum of $2,944.62 and interest as aforesaid."

Defendants denied the execution of the $2,944.62 note and bond, and alleged that if said note and bond were ever executed the same has long ago been paid and satisfied.

After the pleadings were read the plaintiff tendered the following issues, and excepted because the same were not submitted to the jury:

"1. Is plaintiff the owner in fee and entitled to possession of the land described in the complaint?

"2. Are defendants in the unlawful and wrongful possession of the land, and do they wrongfully withhold possession from plaintiff?

"3. What damages has plaintiff sustained by reason of defendants' withholding the possession from plaintiff?"

Defendants also tendered issues which were not submitted, and his Honor prepared numerous issues, as apparently necessary from the pleadings, and stated that he would proceed with the trial of the cause and frame the issues later on, or when the evidence was in, and which appeared then to be required. There was no objection to this course.

The plaintiff proved the handwriting of D. S. Allen, and offered in evidence the following bond:

"$2,944.62. With interest at eight per cent. from the first day of January, 1875, I promise to pay L. B. Allen twenty-nine hundred and forty-four dollars and sixty-two cents, it being due for land and stock, etc., said land lying and being in the county of Franklin, and situated on either side of Lynch's creek, adjoining the lands of J. W. Young, Paul Jenkins and others, and containing three hundred and forty acres, more or less.

"Witness my hand and seal, March 15, 1874.

"D. S. Allen, [Seal.]"

Upon which were indorsed many payments.

The plaintiff then offered in evidence a bond of L. B. Allen to D. S. Allen, dated March 15, 1874, to convey land as follows:

"This obligates me to render to D. S. Allen a lawful deed to a certain tract of land in Franklin county, on Lynch's creek, on which D. S. Allen now resides, when he shall liquidate a bond of $2,944.62 which I have of this date given for said land, etc., and describing said land.

"Given under my hand and seal, March 15, 1874.

"L. B. ALLEN, [Seal.]"

The witness, L. B. Allen, on cross-examination, said he had the above bond in his possession in May, 1892, and brought it to Henderson and had same registered, and paid fees for it.

On re-direct examination plaintiff's counsel asked witness how the bond above mentioned came into his possession, intending thereby to show a transaction between witness and D. S. Allen, who is dead.

Defendants' counsel objected to the question. Objection sustained, and plaintiff excepted.

The witness testified that the body of the bond was in the handwriting of D. S. Allen, and that it had no subscribing witness.

Plaintiff's counsel proposed to prove by this witness that the land referred to in the bond for title was the same land described in D. S. Allen's obligation.

Defendants objected. Objection sustained, and plaintiff excepted.

The witness testified that a fair annual rental value for the land was $250.

The plaintiff then introduced a deed from Arabella Hayes, administratrix of J. J. Hayes, deceased, dated 12th November, 1874, to L. B. Allen, for the land in dispute, but not necessary to be set out.

The plaintiff here rested his case, and the defendants introduced evidence as follows:

Mrs. R. P. Cook: "I am a daughter of J. J. Hayes; he died 9th April, 1872; knew Mr. D. S. Allen very well; did not know L. B. Allen very well; knew about the land trade."

The J. J. Hayes bond was shown to witness by defendant and identified by her.

Plaintiff objected to the evidence of Mrs. Cook tending to show how or in what manner or in what proportion the Allens had made the original payments for said land prior to the execution of the deed from the administrator of Hayes, contending that by the execution of the $2,944.62 bond the defendants were estopped from questioning plaintiff's title.

The Court held that this would be a correct position if the execution of the bond were established, but if such execution were not established the evidence would be pertinent on the third and fourth issues, as then prepared.

Evidence admitted for this purpose, and plaintiffs excepted. Plaintiff excepted to the evidence offered on the same ground, whenever offered in case in evidence of J. J. Hayes and of Gill, and wherever offered.

Mrs. Cook then testified at length as to the purchase of and payment for the land by plaintiff and D. S. Allen, and as to declarations of plaintiff to the effect that Allen owned half and was going to buy the other half of the land from him.

D. H. Gill testified for defendant: "I showed plaintiff the note dated March 22, 1874. He said the note was all right, and was given for the purpose it expressed; also said same about the payments, and said note was all right. He said this note was taken up and the note for $2,944.62 given in its place; and after I called his attention to the fact that the note for $2,944.62 was the oldest he asked for the note. He and his wife then went out, and when he came back he denied knowing anything about the note. I was administrator of D. S. Allen, and had gone to plaintiff to see him about the matter. I am a brother of D. S. Allen's widow; I know Burroughs Allen very well; my brother married Burroughs Allen's sister. I heard Burroughs Allen say he had no interest in the home place here in litigation; that he had been paid for it by his brother, D. S. Allen. This was in the court-house at Oxford. I live three miles from Mark Allen's; he made good crops at first. In 1885 he commenced teaching his children, and rented his land and made very little. D. S. Allen lived on this land from 1870, when he came there, till he died. D. S. Allen's wife had an interest in Hight's estate. He never bought any other tract of land in Franklin county but this."

On cross-examination: "D. S. Allen's personal property was under mortgage at the time of his death. I heard L. B. Allen admit, in 1877 or 1878, that he had been paid up."

The bond under which plaintiff claims title was exhibited, and witness says that he does not believe the credits are in D. S. Allen's handwriting. "I think they were all put there at the same time; looks like it."

On re-direct examination says: "D. S. Allen's habits were economical; he made money farming until farming became unprofitable."

Defendants then offered in evidence the bond for $1,544.68, dated March 22, 1874, as pertinent evidence in the case, since the witness had testified to plaintiff's declarations about it.

Plaintiff objected to admission of the bond and indorsements thereon:

1. Because it is a declaration of D. S. Allen in his favor.
2. Because no land is described therein.
3. Because irrelevant and immaterial.

Objections overruled; plaintiff excepted. The bond was then read:

"$1,544.68. With interest from the first day of January, 1875, I promise to pay L. B. Allen fifteen hundred and forty-four dollars and sixty-eight cents, it being balance due for one-half in a certain tract of land in Franklin county, sold me in 1870, and for money lent for various purposes. The conditions of the bond are that, when satisfied, the said L. B. Allen shall render to me a lawful and warranty deed to the land mentioned above.

"Given under my hand and seal, March 22, 1874.

"D. S. ALLEN, [Seal.]"

There are indorsements on said bond, as follows:

"Received December 10, 1874, ($220) two hundred and twenty dollars on the within."

"Received June 20, 1875, $280 on the within bond."

"Received February 26, 1876, ($167.70) one hundred and sixty-seven dollars and seventy cents on the within."

"Received on the within bond, December 23, 1876, ($500) five hundred dollars."

In talking to the plaintiff about the credit of $280, first credit on the $1,544.68 bond, witness said he asked L. B. Allen if he had bought his brother D. S. Allen's interest in his father's land. He said he had. Asked him if he ever paid his brother for this interest, and he said, 'No, it went into the settlement about this tract of land in dispute.' We were talking about this $280."

Plaintiff excepted to this evidence as immaterial. Overruled; exception.

Defendants offered in evidence the deed or contract by which D. S. Allen sold his interest in his father's estate to L. B. Allen for $280, about which the witness Gill testified being same date as credit on the bond.

Plaintiff objected, not to the execution of this contract, but because same was irrelevant and immaterial. Objection overruled, and plaintiff excepted.

The paper-writing was as follows:

"For the consideration of the sum of two hundred and eighty dollars, the receipt of which is hereby acknowledged, we do herein grant, bargain, sell and convey to L. B. Allen all our right, title and interest to and in every kind and description of property whatever, whether of land, money, or aught else, we have and did inherit by will of James Allen, deceased, to have and to hold, to him and his heirs and assigns forever. Given under our hands and seals, January 20, 1875.

"DEMARCUS ALLEN,
"PAMELIA J. ALLEN.

"Attest: ERASTUS E. ALLEN."

The above contract was duly proven and registered in Granville county, 20th of April, 1875.

James A. Gill: "I am a brother of the defendant Pamelia Allen and brother-in-law of the plaintiff. I heard the plaintiff say in Oxford the land in controversy was D. S. Allen's. He had sued plaintiff for his wife's share in her father's estate, and he claimed this land as a part of it. Plaintiff said he had no interest in the land whatever; it belonged to D. S. Allen." At another time witness said he went to see the plaintiff and D. H. Gill. D. H. Gill handed the plaintiff the $1,544.68 note exhibited and some other notes. Plaintiff took the notes and examined them carefully, and said they were all right. The plaintiff claimed that the $1,544.68 note was taken up and the $2,944.62 note taken in its place. In reading it found the larger note was dated first. He was then asked how he accounted for that, and he then said he didn't know anything about the $1,544.68; said this after going out and talking over the matter with his wife. I asked plaintiff how he happened to make the $2,944.68 note so large if it was for only for half the land, and asked him if anything else was in it; said there were other things—there were some horses and supplies; that he, plaintiff, had originally put in more than D. S. Allen. Plaintiff said he had sold land to Allen at what it cost him. When witness and D. H. Gill were leaving plaintiff said the $1,544.68 note was all right, but he was not prepared to say how it was. His attention was called to the $280 credit, the first on the $1,544.68 bond, and he asked plaintiff if he was paid any money. Plaintiff said, 'No, it was in the settlement about the tract of land in dispute.' Mark Allen farmed at first as long as it was profitable, and did very well as long as it paid. He also taught school. He was sober, steady and attentive to his business, and as economical as any man in my community."

Cross-examined.—"L. B. Allen lived in Granville county, twelve miles from Mr. Hayes direct; sixteen miles by road. D. S. Allen lived half the distance. In conversation was talking about the Mark Allen place. James Allen was the father of the plaintiff. In the suit I claimed the Mark Allen place because I had heard the money of James Allen's widow went in part payment of the Mark Allen land. L. B. Allen admitted he had used a part of the money of James Allen in buying Mark Allen's place. I went with D. H. Gill, administrator of D. S. Allen, to L. B. Allen because L. B. Allen was claiming the $2,944.68 bond against D. S. Allen, and the administrator had found the $1,544.62 bond, and D. S. Allen had no deed. I don't know why, if the bond was paid, D. S. Allen should have drawn deed direct to his brother. L. B. Allen made a careful examination of the $1,544.62 note before saying it was all right. He claimed that the $1,544.62 bond had been taken up and the $2,944.68 bond given in its place; then when the dates were called to his attention, showing the $1,544.62 bond the latest, he said he didn't know how it was. He exhibited the $2,944.68 bond and claimed this was the bond now held for the land. D. S. Allen lived on this land from 1869 to his death."

On re-direct examination he said: "In 1874 land was in Franklin county. This is the only land trade between the brothers for land lying in Franklin county."

W. H. P. Jenkins: "Married sister of the plaintiff and D. S. Allen. I am Superintendent of Public Instruction in Granville county. I have known L. B. and D. S. Allen for fifty years. I was a party to suit for an accounting in estate of my wife's father's land, James Allen. In March, 1875, Mr. L. B. Allen told me in Franklinton that the tract of land in Franklin, where D. S. Allen lived, belonged to him (D. S. Allen). I was contending that the farm in controversy belonged to James Allen's estate, and plaintiff said it belonged to D. S. Allen. I think he said it again. I was also present at conversation spoken of by the Gills, but didn't hear it; I was talking to some one else. D. S. Allen was a man of high moral character, but I don't know his economic habits."

On cross-examination said: "D. S. Allen once owed me a debt, and it was paid by L. B. Allen."

On re-direct examination: "Both went to the war. The debt paid me by L. B. Allen was for teaching. L. B. Allen managed his father's estate. L. B. Allen is a man of industry and judgment."

Dr. R. J. Gill: "I am first cousin to Mrs. Pamelia Allen, and was the family physician of D. S. Allen; was socially well acquainted, and saw him every day. He was one of the best farmers in the county. I had a gin, and in 1877 I ginned twenty-three bales of cotton for him; ginned twenty-one bales the next year. He also carried cotton to another gin—about as much—the same years. He was an economical man in dress and living. His wife did the sewing and cooking for his family. I was very intimate with him; I never knew of any other land trade in Franklin; it was the only land he had then, or they had any transactions about."

(Plaintiff objects to this evidence. Overruled, and plaintiff excepts).

"The $200 note was found in a table drawer in his parlor, where they found his other papers; $750 note found at same place; $1,544.68 bond was found at same place, and the bond of Hayes found at same place."

On cross-examination said: "D. S. Allen quit farming toward the last, and went to teaching school."

Mrs. J. A. Gill: "I am a sister of the plaintiff and D. S. Allen. I was married in November, 1872. In 1870 or '71 was with D. S. Allen. I lived before that at my home in Granville county. We met to settle James Allen's estate, and the interest of each was $280, and Mark Allen said, in presence of L. B. Allen, in a close, small room, where all were sitting around, that his $280 went in payment of his place. This was the only land trade that ever took place between them."

On cross-examination: "There might have been another trade, but I lived in the same house with D. S. Allen, and knew of their dealings, and this was all ever mentioned by them."

P. A. Bobbitt: "I live in Vance county, and D. S. Allen listed the land for taxes."

Mrs. Pamelia Allen: "I am the widow of D. S. Allen. He died October 24, 1891. We were married March 7, 1872. We moved to the land in 1872, and myself and husband lived on the place from 1872. He farmed until seven or eight years before his death; then he taught school. For many years after his marriage he was a very successful farmer. There was no other land trade between the brothers except as to this particular land in controversy."

Defendants closed.

Plaintiff then introduced Mr. A. D. Wester: "Lives in Franklinton; knew D. S. Allen, lived in two miles of him. I was one of the appraisers who set apart his exemptions. This was in January, 1887. D. S. Allen, at that time, said he made no claim to any land."

On cross-examination: "D. S. Allen didn't say he didn't have a deed; said he didn't claim any land. Mr. Finch and Mr. Woody were the other jury to lay off homestead. There was a small excess. I never heard of any sale."

W. A. Woody: "I live in the southern part of county. Was present at laying off of homestead. D. S. Allen said he didn't claim any land. Mr. Finch was rather the foreman of jury of view and did most of the talking. There was no sale of land."

Mrs. L. B. Allen: "I am the wife of L. B. Allen. Was married March 4, 1880. Mr. Allen then lived in Granville county the first year of our marriage. We then moved to Franklin county, five miles from Louisburg. I knew D. S. Allen and know his handwriting. The bond for $2,944.62, dated March 15, 1874, is shown; says she thinks it is in D. S. Allen's handwriting, and the credits on same, 1, 2, 3, 4 and 5, are also in his handwriting. Credit December 22, 1879, is also his; also December 10, 1880; April 4, 1881, was written by witness; December 15 was his; March, 1883, was his. She had a conversation with D. S. Allen January 4, 1877."

Defendants objects to this conversation because witness is interested in event of action. Overruled, and defendants except.

Court holds the result, in case of recovery, would be personalty, and so she would not be interested.

"In 1887, D. S. Allen asked me to run up amount due on the bond, and I made it $3,500; that was all that was said." $1,544.62 bond shown to witness; she said Mr. Gill brought that home within two weeks after Mark Allen's death. "I saw the paper for the first time on that day. Mr. Gill said he was going to be administrator, and had come down to see what L. B. Allen had against the estate. I heard L. B. Allen tell Gill that the $750 note was all right. He had never made any payments except through his brother Mark. I made a copy of the $2,944.68 bond at their instance and gave it to Mr. Gill. Gill had shown the papers, and my husband said they were all right, but said he knew nothing of the $1,544.68 bond, but had a bond for $2,944.62, and plaintiff then went in to get the $2,944.62 bond. Gill didn't present the $1,544.68 bond at first. L. B. Allen said the notes were all right, but had never seen the $1,544.68. I kept my husband's papers, and went out with him to get the bond. I have kept my husband's papers since 1881." (The bond of plaintiff shown witness). "I first saw this paper about 1887; L. B. Allen had it. I took it, and think I put it with his other papers; I think this was the time one of the credits was put on for schooling of my daughter. L. B. Allen didn't say the $280 had been paid, but had been adjusted in settlement. As Gills were leaving, they asked plaintiff if he was not going to let sister have her home. He replied, 'Business was business; he had one bond, and would hold it.'"

On cross-examination: "I never saw any money paid at time credits were entered by me. This was the only land that was ever the subject of trade between L. B. and D. S. Allen."

On re-direct: "She only knows of transactions occurring since marriage."

Plaintiff closed.

After the close of the evidence, and before the conclusion of the argument, the plaintiff insisted, and his Honor stated, that he would submit the following issues to the jury, which he did, without objection, saying there was no evidence that would justify the jury in finding that the $2,944 bond had not been executed:

"1. Did D. S. Allen execute to the plaintiff his bond for the sum of $2,944.62, dated March 15, 1874, as described in the pleadings?

"2. Was said bond paid off and discharged by D. S. Allen?

"3. If not, how much is now due and owing thereon?"

The plaintiff, in apt time, asked the Court to instruct the jury as follows:

"1. The plaintiff having proven and offered in evidence the bond for $2,944.62, it devolves upon the defendant to prove to the satisfaction of the jury that said bond has been paid, and the Court charges the jury that there is no evidence of any payment on said bond other than the indorsements on same. Therefore, if the jury believe the evidence of the plaintiff, they must answer the second issue, No.

"2. That there is no evidence to show that the $1,544.68 bond was intended to go as a payment on the $2,944.62 bond, and the jury must not consider it in determining how much there is due on the $2,944.62 bond."

The Court declined to give the foregoing prayer for instructions, and the plaintiff excepted.

On the close of the evidence the Court, having settled the three issues as shown in the record, stated to the jury the conditions of the different parties leading up to these three issues, and then further charged the jury that there were only three issues necessary to determine the controversy between these parties, all of them addressing themselves to the execution and payment of the $2,944.62 bond for the land in controversy, bearing date 15th March, 1874; that it did not matter what was the original interest of the two Allens in the land, or what relations they respectively bore to it, nor how much either had paid on it; that the deed of Mrs. Hayes, administratrix, placed the legal title to the land in plaintiff, L. B. Allen, and that being true, if D. S. Allen, the ancestor of defendants, and under whom defendants claimed, had agreed to buy the land from him and executed the bond to him of 15th March, 1874, to amount of $2,944.62 for land and stock, that the law would not deprive L. B. Allen of the title until such bond was paid up; that there was no evidence that would justify the jury in finding said $2,944.62 bond was never delivered, and that if the jury believed the evidence they would answer the first issue, "Yes," and the controversy really turned on whether the bond had been paid off or not, and if not, how much was due thereon; that on the second issue the burden was on the defendants; that the defendants, who claimed that the $2,944.62 bond had been paid, were required to prove it by the greater weight of evidence, and the jury should consider the evidence under that rule to guide them, and say whether or not the bond had been paid off, and if it had not, in answer to the third issue they should say how much was still due thereon. The Court here adverted to all the evidence pertinent to this issue, including the evidence of the $1,544.68 bond, and the admission of L. B. Allen concerning same, and the credits indorsed on same, including the credit of $280, which had been shown to be the amount coming to D. S Allen from his father's estate, and which had not been otherwise paid, as defendants contended. The Court did not advert to the evidence of Mrs. Cook as to the original payment, in terms, nor otherwise allude to the same in the charge, except in so far as such evidence was excluded by first part of the charge and by the statement of the Court when same was admitted.

Plaintiff excepted to charge as given.

The jury answered the first issue, "Yes," the second issue "Yes," and the third issue "None."

The Court signed the judgment set out in the record.

Plaintiff moved to set aside the verdict. Motion denied. Plaintiff then moved for a new trial upon the ground of the several exceptions taken in the course of the trial, the refusal of the Court to charge as requested, and to the charge as given. Motion denied, and plaintiff excepted and appealed.

Messrs. E. W. Timberlake, F. S. Spruill and *T. M. Pittman*, for plaintiff (appellant).

Messrs. C. M. Cooke, A. C. Zollicoffer and *T. T. Hicks*, for defendants.

MACRAE, J.: It is the duty of the trial Judge to submit to the jury such issues, arising upon the pleadings, as will present the whole matter in controversy between the parties and will allow the introduction of all material evidence, the responses to which will enable the Court to pronounce judgment upon the merits. See cases cited in Clark's Code, 2 Ed., sections 395 and 396. It appears by the pleadings that the simple questions of ownership and possession are not the only matters necessary to be passed upon by the jury. The defendants set up equities upon which they demand substantial relief. In his reply the plaintiff distinctly admits the contract of sale between himself and D. S. Allen, the bond for $2,944,62 executed to plaintiff by D. S. Allen, and the bond for title given by plaintiff in consideration thereof; and he avers the non-payment of the purchase-money by Allen, and the plaintiff's readiness to make title according to his bond upon said payment. The defendants deny the execution of the bonds and aver that if they were executed they have long since been fully paid. There was no dispute as to the location or description of the land. The heirs of J. J. Hayes were not made parties.

The issues presented by the plaintiff had no reference to the equities set up and admitted the right of the defendants to the possession and a title if the purchase-money had been paid; therefore it was proper for his Honor to refuse to submit them. To dispose of the question of issues now: His Honor went to the true controversy between the parties. There being no evidence on the part of defendants to contradict that offered by the plaintiff as to the execution of the bond for title and the bond for the purchase-money, without objection by defendants, who were the ones to complain if there had been any cause, his Honor eliminated all else and directed the attention of the jury to the question whether the purchase-money had been paid in full or in part; for upon these questions alone depended the judgment of the Court as to the right of possession of the land; the legal title had been ascertained to be in the plaintiff, the relief was not to be a judgment for possession and damages, but as to the equitable rights of the parties.

The second exception relied upon is as to the incompetency of the testimony of Mrs. Cooke and other witnesses concerning the contract between Hayes and the plaintiff and Allen, upon the ground that the relation of vendor and vendee between the plaintiff and Allen being established, any evidence as to prior transactions between them was irrelevant, in the absence of allegations of fraud. The case was complicated by the complaint and answer referring largely to these prior transactions, and it turned out that the admissions in the reply simplified the controversy; but in the limited time allowed for trial of cases at *nisi prius* it is not always an easy task to elicit the true issues from the pleadings until they are made clear by the testimony and admissions on each side. If testimony is admitted which is in its nature prejudicial to the one side or the other, and is not withdrawn from the jury with all necessary cautions, a new trial will follow the error. But where no injury could have resulted from its introduction it does not follow that a new trial will be granted.

His Honor promptly announced to the jury, when he presented the true issues to them, "that it did not matter what was the original interest of the two Allens in the land, or what relations they respectively bore to it, or how much either had paid on it," that if they believed the evidence they should respond to the first issue, Yes. He could not more effectually have withdrawn the objectionable testimony from them, and we must assume that they were at least men of ordinary intelligence.

The third exception is to the introduction of the note for $1,544.68 and the testimony of D. H. Gill and J. N. Gill in relation thereto. If the only evidence in regard to this note or bond had been that it was found among the papers of D. S. Allen after his death, it could not have been received in evidence against the plaintiff, for there was nothing which connected it with the plaintiff, no entry upon it in his handwriting, and it would have been (as was contended by the counsel for plaintiff) a declaration in his own favor by D. S. Allen in the absence of the plaintiff, and in this view it would have been entirely inadmissible. But defendants contended that this note was given in some way in part payment of the note for $2,944.62, and they offered evidence of its presentment to the plaintiff and his explanations and his declarations that the land had been fully paid for; they relied upon the dates of the two notes to show that the $1,544.68 had been given subsequently to the $2,944.62 note, and the evidence offered to show that the plaintiff admitted that the $280 credit upon the lesser note was a payment by D. S. Allen on the land. The dates of the credits upon these notes were also relied upon as circumstances to strengthen the defendant's contention. These, and other testimony offered to connect the two notes, constituted some evidence competent to go to the jury to establish the defendant's contention. It was not now an effort to establish a parol trust in plaintiff, which might have required a higher degree of proof, but it was simply to make good the plea of payment of the $2,944.62 note given for the purchase-money of the land.

Another objection to the admission of the $1,544.68 sealed note or bond in evidence was that there was no sufficient description of the land in it, and therefore that it was void as a bond for title. But it was not signed by the plaintiff, and if this clause in the bond had been omitted, still the bond would have been admissible in connection with the other testimony above referred to, offered for the purpose of connecting it with the larger bond. The bond for title relied upon by the defendants was that made by the plaintiff on March 15, 1874, and admitted by him. It was in evidence that there was but one land transaction between the plaintiff and D. S. Allen, and the offer of the note for $1,544.68 was not made to establish the contract of sale, but to set up a credit upon the larger note. In this view we hold that the defective description did not affect the competency of the note as evidence for the purpose for which it was offered.

The fourth exception is as to the admissibility of the deed or contract by which D. S. Allen sold to the plaintiff his interest in their father's estate for $280, which plaintiff contends was irrelevant. As we understand it this was offered in connection with testimony as to admissions of the plaintiff that this sum had been appropriated by him in part payment of D. S. Allen's indebtedness to him upon the land, and in this view it was competent.

The fifth and last exception relied upon by the plaintiff is the refusal to give the instructions prayed for by him, as set out in the statement of the case. In other words, that there is no evidence that the $1,544.68 note was intended to go as a credit upon the $2,944.62 note, which was found to have been given for the land. We have already adverted to the testimony relied upon by the defendants to connect the former with the latter note or bond, and have indicated our opinion that there was some evidence proper to be submitted to the jury upon this contention; and for the same reason we concur in the view taken by his Honor in refusing the prayer for instructions. There is

No Error.

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*B. W. BALLARD & CO. v. G. W. JOHNSON.

Agricultural Lien—Landlord's Lien for Rent and Advances—Landlord's Priority of Lien over Advances by others Attaches only on Crop of Current Year.

Although under sections 1754, 1799 and 1800 of *The Code* the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year.

This was a CIVIL ACTION, tried at January Term, 1893, of FRANKLIN Superior Court, before *Shuford, J.*, and a jury.

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*CLARK, J., did not sit on the hearing of this case.

The action of claim and delivery of personal property was brought by plaintiffs against the defendant George Johnson to recover possession of certain crops which had been conveyed to plaintiffs by defendant by lien bond and mortgage registered March 23, 1891, to secure advances to be made to enable him to make a crop during the year 1891 on lands rented from defendant D. H. Gill. Said D. H. Gill was allowed to interplead and set up title to crops in himself. In response to issues submitted to the jury they found that the value of the crops seized by the plaintiffs was $65.71, and that the defendant George Johnson was indebted to the defendant D. H. Gill, as alleged in said Gill's interplea, in the sum of $66.68.

The defendant D. H. Gill, in his own behalf, testified as follows: "George Johnson lived on my land in 1890. At some time during said year I contracted to rent him the said land for 1891 for the price of $90. In the beginning of the year 1891, when we came to settle the transaction of 1890, he was in debt to me for rents and supplies in the sum of $80. I allowed him $20 for building a tobacco barn and gave him the balance of $60. He agreed to pay me $150 rent for the year 1891. The rent agreed upon for the year 1891 was intended to cover $90 rent for 1891 and the balance of $60 which the defendant owed me. That was the basis of the contract, though I considered it an entirely new agreement. The object was to make the $60 a part of the rent for 1891 so as to give me a lien for it on the crop of that year. I received of crop of 1891 $95.02. Before the crop was seized Mr. Ballard wrote me and asked me if I had any lien on the crop of Johnson. I made no reply. This was in the fall after part of the crop was gathered."

It was admitted that there was still due the plaintiff for supplies to make said crop $55, and that the value of the crops seized was $65.71; that the plaintiff incurred an expense of $26.41 for saving and marketing the crops; that George Johnson was ready, able and willing to save and market the same, and was proceeding to do so at the time of its seizure, and that the other personal property embraced in plaintiff's mortgage was insufficient to discharge plaintiff's debt.

Plaintiff asked his Honor to charge the jury upon the testimony that the defendant Gill was not entitled to recover, the lien of the plaintiff for supplies being prior and superior to that of said Gill, except for the $90 rent and advances made during the year 1891, amounting to $12, and that as far as the contract for rent attempted to secure the amount of $60 due for the transaction for 1890 it was void as to this plaintiff. His Honor refused to give this charge, and instructed the jury to return a verdict as above stated. Plaintiff excepted, and moved to be allowed $26.41 expended in gathering and making said crops. This motion and motion for new trial were overruled, and from the judgment for defendant Gill the plaintiffs appealed.

Mr. N. Y. Gulley, for plaintiffs (appellants).
Mr. C. M. Cooke, for defendant.

SHEPHERD, C. J.: For the encouragement of agriculture the Legislature has provided that one who advances money or supplies to any person who is engaged in, or about to engage in, the cultivation of the soil shall, if the agreement be in writing and registered, be entitled to a lien on the crops made during the year in which such advances are made. It is also provided that this lien shall be preferred "to all other liens existing or otherwise, to the extent of such advances." *The Code*, §1799. It is further provided by section 1754 that a landlord shall have a lien on the crops of his tenant until the rents are paid and until all the stipulations contained in the lease or agreement shall be performed, and until the landlord shall be paid for all advances made and expenses incurred in making and saving said crops. The act provides that such lien shall be preferred to all other liens.

The seeming conflict as to priority is avoided by section 1800 of *The Code*, in which it is declared that the lien for advances "shall not affect the rights of landlords to their proper share of rents" (*Wooten* v. *Hill*, 98 N. C., 48) and "all advancements made and expenses incurred in making and saving said crops" (*Brown* v. *Brown*, 109 N. C., 124), but it is plain, both from the language as well as the spirit of the law, that the lien applies only for rents due and advances made for and during the year in which the crops are cultivated. It was not intended to confer a lien upon the landlord for any antecedent debt which the lessee might stipulate to pay and give it a preference over the agricultural lienee, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in *Thigpen* v. *Maget*, 107 N. C., 39, and is undoubtedly in harmony with the policy of the law in securing the landlord his rent, and at the same time enabling the tenant to obtain advances from third parties.

In this case it is manifest from the testimony of the defendant that he leased the land to Johnson for the year 1891 for the sum of ninety dollars, and that the additional sixty dollars was the balance due him for the preceding year. He should only have been allowed ninety dollars and twelve dollars advances, and after discharging these amounts the proceeds should have been applied to the payment of the plaintiff's advances and the expense of saving and gathering the crops. There must be a

New Trial.

S. S. QUINNERLY v. SAMUEL QUINNERLY.

Probate Certificate, presumptive evidence that probate was properly taken — Mortgage — Priority—Notice — Registration—Vendor's Lien.

1. Where the certificate of the Probate Court did not state that the execution of a mortgage had been acknowledged by the grantor or proved by a witness, but merely recited that the mortgagee had "procured the same to be proved by this Court," the presumption is that the probate was properly taken.
2. No lien for the unpaid purchase-money exists in favor of a vendor who has conveyed land by deed; nor can the vendor reserve a lien except by taking his security in writing and having it duly registered.
3. No notice to a purchaser of land, however full and formal, will supply the place of registration; therefore, a mortgage given for the purchase-money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof.

CIVIL ACTION, heard at Fall Term, 1893, of PITT Superior Court, before *Hoke, J.*, on a case agreed, the facts being substantially as follows:

On the 18th day of December, 1875, Samuel Smith and wife sold and conveyed to the defendant Samuel Quinnerly a certain tract of land in Pitt county, by deed, which was duly probated and registered in said county.

Upon the same day and date, and for the purpose of securing the unpaid balance of the purchase-money, the defendant Quinnerly simultaneously reconveyed the said land by mortgage deed to the vendor, Samuel Smith, which was recorded in the office of the Register of Deeds of Pitt County on the *10th day of September, 1877.* On the 5th day of January, 1877, for money loaned, the defendants Samuel Quinnerly and wife, Sarah P. Quinnerly, executed and delivered their mortgage deed upon the said land, including therein seventy acres, more or less, not embraced in plaintiff's mortgage, to the defendants Caroline L. Nelson and Susan C. Williams; and on the *13th day of January, 1877*, said mortgage was admitted to probate, and upon order of the Probate Court was registered. In a commission to a Justice of the Peace to take the privy examination of the wife of the mortgagor was a recital that the mortgagees had "procured the same (the mortgage) to be proved by this Court." There was no other recital as to acknowledgment or proof of execution by the mortgagor.

Samuel Smith assigned the mortgage executed to him, and for the foreclosure of which this action was instituted, to the plaintiff, S. S. Quinnerly. Sarah Quinnerly, the wife of the mortgagor, died before the commencement of the action.

Upon these facts his Honor adjudged that the mortgage to Mrs. Williams and Mrs. Nelson was properly proven and had priority to the mortgage to Samuel Smith, which was assigned to the plaintiff, and from this judgment the plaintiff appealed.

Messrs. Latham & Skinner, for plaintiff (appellant).
Mr. O. H. Guion, for defendant.

CLARK, J.: The plaintiff contends that the probate of the mortgage to Nelson and Williams was insufficient to render the registration thereof valid. The ground assigned is that the Probate Court did not adjudge that the mortgage had been acknowledged by the grantor, or its execution proved by the witness thereto. It merely recites that the mortgagee had "procured the same to be proved by this Court." It is true, as contended by the plaintiff, that, if the probate was in fact insufficient, the registration was invalid and of no effect. *Todd* v. *Outlaw*, 79 N. C., 235, and cases there cited. And there are numerous cases since. *Long* v. *Crews*, 113 N. C., 256. But there was no evidence to show that the probate here was insufficient. The presumption is that it was properly taken. In *Starke* v. *Etheridge*, 71 N. C., 240, it is said (page 245): "The probate of a deed is but a memorial that the attesting witness swore to the *factum* of the instrument by the parties whose act it purports to be. The officer who takes the probate does not look into the instrument or to the interests acquired under it, and, as the probate is *ex-parte*, it does not conclude. Therefore, it may be shown by parol that what purports to be a deed is no deed, but a forgery; or was executed by a married woman or an infant; or was not proved so as to make the deed valid; or that it was not proved at all prior to registration; or was proved by an incompetent witness, as in the case of *Carrier* v. *Hampton*, 11 Ired. (33 N. C.), 307. See also, *McKinnon* v. *McLean*, 2 Dev. & B. (19 N. C.), 79. As the validity of the registration may be thus impeached, so it may be supported by the same kind of evidence. *Justice* v. *Justice*, 3 Ired. (25 N. C.), 58; *Moore* v. *Eason*, 11 Ired. (33 N. C.), 568." Accordingly, in that case (*Starke* v. *Etheridge*), in which there was no probate on the deed, or on the record of its registration, beyond the word "Jurat," written opposite the name of the subscribing witness, an admission that the deed had been in fact properly proved before the proper officer cured the defect. Here the recital in the probate that the mortgagees Nelson and Williams "had procured the same to be proved," not being impeached, is conclusive of sufficient and proper proof. *Horton* v. *Hagler*, 1 Hawks (8 N. C.), 48; *Devereux* v. *McMahon*, 102 N. C., 284.

The plaintiff further contends that his mortgage, being for the unpaid purchase-money, is entitled to priority over the Nelson mortgage, though registered after it, and that Nelson and Williams had notice that the purchase-money had not been paid. As to this, it will be sufficient to quote from *Blevins* v. *Barker*, 75 N. C., 436 (on page 438): "Under the act of 1829 (now section 1254 of *The Code*) no notice to the purchaser (here the defendant), however full and formal, will supply the place of registration. *Robinson* v. *Willoughby*, 70 N. C., 358; *Fleming* v. *Burgin*, 2 Ired. Eq. (37 N. C.), 584; *Leggett* v. *Bullock*, Busb., 283; *Miller* v. *Miller*, Phil. Eq. (62 N. C.), 85. It is altogether too late to contend that the vendor of real estate, who has conveyed it by deed, has a lien upon the land for the purchase-money; nor can the vendor reserve a lien, unless he take his security in writing and have it registered. All secret trusts, latent liens and hidden encumbrances are, and were intended to be, cut up by the roots, by force of our registration laws. And since the decision of this Court in *Womble* v. *Battle*, 3 Ired. Eq. (38 N. C.), 182, the law as here announced has been considered as well settled in North Carolina."

No Error.

A. P. BRANCH v. JOSEPH T. WARD et al.

Husband and Wife—Wife's Separate Estate—Disposition of Rents of Wife's Land by Husband without her Consent—Silence of Wife not Acquiescence—Trustee, removal of.

1. Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same.
2. Where the trustee in a deed of assignment for the benefit of creditors was the son of the assignor, and a minor, and there was no finding by the Court below that he was unsuitable or unreliable

because of mental deficiency or moral obliquity, and, in a proceeding to remove him, he offered to give bond in double the amount of property in his hands, it was error to remove him and appoint a receiver of the property.

This was an APPLICATION to continue a restraining order to the hearing, heard by *Bynum, J.*, at Chambers in WILSON, Thursday, February 8, 1894.

It was admitted that the articles of personal property were raised on the lands that belonged to the *feme* defendant. Counsel for defendant moved the Court to discharge the property and dissolve the restraining order as to it. The Court denied this motion, holding that there was enough evidence to go to the jury as to whether there was not an assent on the part of the wife that the husband might use as his own and for his separate estate the property assigned, and the defendants excepted.

The defendants Martha J. Ward and Herbert Ward, the assignees, moved his Honor that they be allowed to file a bond, or undertaking to secure the plaintiff, covering double the full value of the property embraced in the injunction, and that therefore the receiver should not be appointed and the injunction should be vacated. Motion refused, and defendants excepted.

The Court gave the judgment appointing a receiver and continuing the injunction, and defendants appealed.

Messrs. Busbee & Busbee, for plaintiff.

Messrs. Woodard & Yarborough and *Swift Galloway*, for defendants (appellants).

AVERY, J.: "It is better" (said SHEPHERD, C. J., in *Wells* v. *Batts*, 112 N. C., 290—13 Am. St. Rep., 506) "that the law should require her (the wife's) positive and unequivocal assent than to destroy the domestic tranquility by forcing her, at the peril of forfeiting her rights, to exercise a constant and irritating surveillance over the conduct of her husband in the management and cultivation of her lands for their joint support. No inconvenience can result from such a ruling, as it is quite easy for a party making advances to require that she be joined as a party to the mortgage." It was admitted that the personal property, as to which counsel moved to dissolve the order, was the crop raised during the year 1893 on the land that belonged to the *feme* defendant. She was therefore the owner and had unquestionably a right to call her husband to account for it. *The Code*, §1835. The husband could not, without her unequivocal assent, transfer the property to another and relieve it in his hands of the liability which attached to it in his own. The cotton raised on her farm during the previous year was hers, into whatever hands it might pass without her positive acquiescence in the sale. It is not contended that she assented directly and positively, but only by implication arising from her silence, to the disposition which the husband attempted to make of those articles. We conclude, therefore, that the case is governed by the principle laid down in *Wells* v. *Batts*, *supra*, and that there was error in continuing the restraining order as to the rents raised on the wife's land during the preceding year.

There was no finding in the Court below that Herbert Ward, the trustee named in the deed of trust executed by J. T. Ward, was unsuitable or unreliable because of mental deficiency or moral obliquity. It appeared that he was quite young (twenty-one years old in November, 1893), while it was suggested in the pleadings that he would probably be influenced in the management of his trust by the other defendants, his father and mother. On the other hand, he offered to file a bond in double the value of the property in his hands, after having introduced testimony tending to prove his good character. Unless sufficient cause was shown for removing the trustee, who had the custody of the property, either on account of his previous conduct of the business, or his unfitness for some other reason, it would seem that there would not be sufficient ground for appointing a receiver and continuing the injunction as to the other property when he was ready to give ample security to indemnify all parties interested against loss by reason of default on his part. When the cause shall be heard below the proof upon this point will doubtless be fully considered.

Let this opinion be certified to the end that proper orders may be made in the Court below. There is

Error.

PATTIE D. B. ARRINGTON v. J. P. AND B. L. ARRINGTON, Executors of A. H. Arrington, et als.

Action to Subject Lands of Devisees and their Vendees to Payment of Decedent's Debts—Insolvent Estate—Lis Pendens—Constructive and Actual Notice—Bona Fide Purchaser without Notice.

1. Under section 229 of *The Code*, which is a statutory substitute for the common law rule of *lis pendens*, it is unnecessary to file a separate and formal notice when the action affecting the title to land is pending in the county where the land is situated, provided the pleadings contain the names of the parties, the object of the action and a description of the land to be affected.
2. Where the designation of land in the pleadings is so definite that any one by reading it can learn thereby, either by description or reference, what property is intended to be made the subject of litigation, it is sufficient to constitute *lis pendens*.

3. Though a greater particularity is required when one of several parcels or a part of a single parcel of land is the subject of the litigation, yet, where the entire real estate of a decedent is, in the absence of personal assets, liable to be charged with the payment of his indebtedness and the plain object of the action is to subject the same, a purchaser will be affected with constructive notice as to any land situated in the county in which the action is pending, especially where the summons includes the devisees of the decedent and the complaint alleges that at the time of his death the decedent was seized and possessed of a large quantity of real and personal property which went into the hands of his executors, and that his children, named in the summons and complaint, are his devisees and legatees and each entitled to an equal share of *said estate.*

4. Although, where a suit affecting the title to real estate is prosecuted with diligence, the *lis pendens* continues until final judgment, or until canceled under direction of the Court, and no loss or destruction of the notice will affect its efficiency, yet, where the suit is transferred, by consent, to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the *lis pendens* fails and a *bona fide* purchaser will be protected.

5. A judgment against the executors of a decedent simply ascertaining the amount of the indebtedness and not being a lien upon his lands is not constructive notice of the insolvency of the estate, and a *bona fide* purchaser, for value, of land from the devisees, after two years from the grant of letters, not having *actual* notice of the judgment or of the insolvency of the estate, will be protected.

6. One who, with actual notice of the insolvency of the decedent's estate, purchased land from another, who, with like notice, had bought from the devisee, is not protected by section 1442 of *The Code*, but the land may be subjected to the payment of the indebtedness of the estate.

7. One who, in good faith, purchases property upon credit at a fair price from an insolvent debtor is a purchaser for value; therefore, one who, after two years from the grant of letters, for value and without notice of fraud in the devisee, purchases land from the latter and at once reconveys it as security for the purchase-money is a purchaser for value and protected by section 1442 of *The Code* against creditors of an insolvent estate.

8. One who, with actual notice of the insolvency of an estate, purchases land from one who, without such notice, bought from a devisee after two years from the grant of letters, will be protected by his vendor's want of notice.

9. T., after two years from the grant of letters on decedent's estate and during the pendency of a suit to subject the land to the payment of his debts, purchased the land from a devisee, and thereafter, and after the breaking of the *lis pendens*, sold to R., who had no constructive notice of the pendency of such action or actual notice of the insolvency of the estate. An attorney, to whom no fee or general retainer was paid, but with whom R. consulted, had actual notice of the insolvency of the estate, but did not communicate it to R., and did not act as the agent of R. in the purchase of the land: *Held*, that R. was a *bona fide* purchaser for value and is not chargeable with such attorney's knowledge otherwise and previously obtained of the former *lis pendens* and the insolvency of the estate.

10. The redelivery of an unregistered deed is not a reconveyance of the land, but only an estoppel on the grantee against setting up a title the evidence of which he has voluntarily destroyed.

11. The fact that a partition of lands has been made among devisees does not estop a legatee from enforcing his claim against the land, except as against purchasers in good faith for value and without notice.

(Discussion by Chief Justice SHEPHERD of *bona fide* purchasers in equity and under the Statute of Elizabeth).

CIVIL ACTION, heard upon exceptions to the report of J. M. Mullen, Referee, at Spring Term, 1893, of VANCE Superior Court.

Mr. R. B. Peebles, for petitioners S. C., A. H. and J. C. Arrington.

Mr. R. O. Burton, for Ricks, Tisdale, Battle, trustee, and others.

SHEPHERD, C. J.: At the Fall Term, 1874, of the Superior Court of Franklin County, the plaintiff recovered a judgment for the sum of $9,096.95 against L. N. B. Battle, Thomas J. A. Cooper, and the executors of A. H. Arrington, deceased. The said Battle was the guardian of the plaintiff, and the said Arrington and Cooper were sureties to the bond of said Battle as administrator of one Evans, the latter being a surety to the guardian bond of the said Battle.

The present action was instituted in the Superior Court of Nash County, at the Fall Term, 1879, for the purpose of enforcing the payment of the said judgment against the executors and devisees of the said Arrington, and also against the representatives of the said Cooper. As there is no exception, so far as this appeal is concerned, relating to the estate of said Cooper, now deceased, we will, for the purposes of the discussion, treat the action as if it had been brought alone against the real and personal representatives of the said Arrington. The complaint, among other things, alleges as follows: "That A. H. Arrington is dead, leaving a will, which has been duly proved in Nash county, and John P. Arrington and B. L. Arrington are duly appointed and qualified executors thereof. The defendants John P. Arrington, Mary Thorpe, Thomas Arrington, Samuel Arrington, A. H. Arrington, George Arrington, Henry Arrington and Joseph Arrington are devisees and legatees under said will, and are each entitled to an equal share of said estate. * * * That A. H. Arrington, at the time of his death, was seized and possessed of a large quantity of real and personal property, of great value, which went into the hands of his said executors." The prayer is for an account of the personal assets, and, if they should be found insufficient to pay the indebtedness, that the real estate of the said Arrington be sold and converted into assets for that purpose.

At the Fall Term, 1882, the case was removed to Vance county and, after several orders of reference and reports of referees (it having been found that a sale of the real estate was necessary), it was at May Term, 1891, referred to J. M. Mullen, "to state the account of John P. Arrington, as executor of A. H. Arrington, since the rendition of his account, which was confirmed at May Term, 1885, and also to ascertain how contribution should be made, not only between the two estates (the estates of Arrington and

Cooper), but also between the devisees of A. H. Arrington and those to whom some of said devisees have conveyed land devised by said testator." It was also directed by the order of reference that "all persons who have so acquired any of the testator's real estate should be notified by the said referee of the time and place of the hearing before him, and should be allowed to come in and make themselves parties to this action before him."

Under this order of reference Samuel L. Arrington, A. H. Arrington and Joseph C. Arrington, who still own their respective shares in the real estate as devisees of their deceased father, were permitted to file an answer. This answer sets forth the various tracts allotted to each of the devisees, the disposition which has been made of them and the names of the purchasers. The answer also alleges that Samuel L. and Joseph Arrington are each entitled to a specific legacy of $150, which they claim is a charge upon all of the real estate. These defendants prayed that it be ascertained what lands are liable to be sold; that each tract should be charged with its *pro rata* part of the indebtedness, and for other and further relief. To this answer Ricks, York and others, purchasers from the other devisees, responded, alleging that they, or those under whom they claimed, were "*bona fide* purchasers for value, and without notice," and that they purchased more than two years after the qualification of the executors of said Arrington. They deny that the general indebtedness or specific legacies are a charge upon their lands, and they also plead the statute of limitations. Many exceptions were made by the various parties to the report of the referee, and the rulings of Judges Bryan and Shuford upon the same. It was found by the referee that the sales of said tracts were all made more than two years after the qualification of the executors, and that several of the purchasers were *bona fide* purchasers, for value, and without notice. *The Code*, §1442.

1. The first important question to be considered is whether those who purchased lands lying in the county of Nash, after the beginning of this action and the filing of the complaint, are affected with constructive notice. In the case of *Collingwood* v. *Brown*, 106 N. C., 362, we had occasion to consider at some length the provisions of section 229 of *The Code*, in its relation to what is sometimes called the "common law rule of *lis pendens*." Our conclusion was that, as to real property, there is but one rule of *lis pendens* in this State, and that the statutory provision is a substitute for the common law rule previously followed by our Courts. It may, therefore, be assimilated in many respects to that species of notice known as "constructive notice," and the requirements of the statute must be fully complied with. We held, however, that, where the action is pending in the county in which the land is situated, it is unnecessary to file a separate and formal notice, provided the pleadings contain the names of the parties, the object of the action and a description of the land to be affected.

It is unquestionably true, as contended by counsel, that the property must be "pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing, and warn them not to intermeddle." But it is "not necessary that the land should be described by metes and bounds; certainty to a common intent—reasonable certainty—is sufficient." 2 Pom. Eq. Jur., 634. "Thus it will be seen that although it is necessary in order to constitute *lis pendens* that the proceedings should, directly or indirectly, designate specific property, yet, where the description is so definite that any one reading it can learn thereby, either by the description or reference, what property is intended to be made the subject of litigation, it is sufficient." Benn. Lis Pend., sec. 93; 1 Freem. Judgm., sec. 197. As illustrative of the principle deducible from the foregoing authorities we may refer to the case of *Green* v. *Slayter*, 4 Johns. Ch., 39, where the description was "divers lands in Crosby's Manor," held in trust by the defendant for the complainant. "It was decided," says Bennett, *supra*, "to be the duty of the public to inquire of the defendant, and thus ascertain that the property involved was covered by the description. * * * That is to say, it becomes the duty of the purchaser to avail himself of the information given by the pleadings, by the use of reasonable diligence, to ascertain, at his peril, whether the property he is about to purchase is the same involved in the suit." "Certainty to a common intent is all that a chancellor should require." *Le Neve* v. *Le Neve*, 2 White & T. Lead. Cas. Eq., 197, note.

We have examined the cases cited by counsel, and are of the opinion that they do not conflict with the views just quoted. Much greater particularity is required where one of several parcels, or a part of a single parcel, of land is the subject of the litigation. In such cases there should be a sufficient description to identify in some manner the specific land to be affected; but where, as in this case, the entire real estate of a decedent is, in the absence of sufficient personal assets, liable to be charged by the law with the payment of his indebtedness, and where it can be clearly seen that the object of the action is to subject the same, it cannot, we think, with any show of reason, be insisted that a purchaser should not be affected with constructive notice as to any land situated in the county in which the action is pending. There is certainly enough to inform the purchaser that the property he is purchasing may be necessary to pay the indebtedness of the estate, and this is sufficient to bring the case within the principle of the rule as indicated by the authorities to which we have referred.

It may be further observed that the summons in this action includes the devisees of the said Arrington, and the complaint alleges, as we have seen, that he was at the time of his death "seized and possessed of a large quantity of real and personal property, which went into the hands of his executors." It is further alleged that the children above mentioned are "devisees" and legatees under the will of said Arrington, and that they are "each entitled to an equal share of said estate." The necessary inference is that all of the estate, both real and personal, was devised and bequeathed to the said children, and that it is this real estate, and none other, which is sought to be subjected in this action. If this be not so, it is difficult to understand why the said children are made parties; and, if they do take all of the real estate of the said Arrington, it is equally difficult to understand why an examination of the will, which is expressly referred to in the complaint, would not disclose—if, indeed, it were necessary—a more specific description of the said property. It may also be remarked that the reference to the land as that "which went into the hands of his (Arrington's) executor," while technically incorrect, is an indication that the lands referred to were those mentioned in the will.

Taking the whole complaint, and considering the character of the action, we cannot entertain a doubt that those of the defendants who purchased lands in Nash county after the filing of the complaint, and before the removal of the cause to Vance county, are affected with constructive notice.

The ruling of his Honor upon this point must therefore be sustained.

2. Another serious question to be determined is whether the defendants who purchased lands in Nash county after the removal of the case are also bound by the *lis pendens*. We have but little doubt that, had this action been removed

in the usual manner, the *lis pendens* would not have been destroyed. Without entering into a general discussion of the subject, it is sufficient to say that where the suit has been prosecuted with proper diligence the *lis pendens* continues until the final judgment (1 Beach, Mod. Eq. Jur., 440, and Benn. Lis Pend., sec. 78), or until it has been canceled under the directions of the Court. *The Code*, §229. The mere loss or destruction of the notice will not affect its efficiency, if the statute has been fully complied with. Benn. Lis Pend., sec. 330. But, while all this may be true, the Courts will nevertheless refuse to enforce the rule unless the party invoking it clearly brings himself within its true spirit and principle; and therefore if, by any act of his own, he has, contrary to the usual course of the Court, consented to, or been instrumental in, the removal from its files of the notice of *lis pendens* (or, as in this case, its substitute, the complaint), leaving nothing whatever upon the record which could inform a purchaser of the nature of the action, and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. The rule *lis pendens*, while founded upon principles of public policy and absolutely necessary to give effect to the decrees of the Courts, is nevertheless, in many instances, very harsh in its operation; and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris*. Certainly he cannot claim its protection when, as we have observed, he has done anything that prevents the purchaser from learning the nature of his claim by an inspection of the records. That the doctrine of estoppel may be invoked in bar of the enforcement of the rule is well settled. Bennett, *supra*, sec. 110. It is applied in cases of negligence in failing to prosecute the action, and also where the plaintiff makes such a disposition of the case that it may be inferred that the right to enforce the *lis pendens* has been abandoned. Bennett, *supra*, secs. 109–111, note. While we are unable to find any decision directly in point, we are satisfied that the views we have expressed, as applicable to the question under consideration, are well sustained by the principle just stated. If the neglect to fully prosecute a suit, so as to lead a purchaser to infer that the *lis pendens* is abandoned, will work an estoppel, it would seem plain that the voluntary removal of everything from the Court which could possibly give any information as to the object of the action should have the same effect.

We need not pause to consider the justness of the criticism to be found in some of the text-books upon the use of the term "constructive notice" in connection with the doctrine of *lis pendens*. It is doubtless true that, generally speaking, the doctrine is really not founded upon notice at all, but upon considerations of a stern public policy, which does not permit a party litigant to convey to others the subject of the litigation, so as to prejudice the rights of the opposite party. *Bellamy* v. *Sabine*, 1 De Gex. & J., 566. This is evident from the fact that originally the rule was enforced in cases where a *subpœna* was issued before the filing of the bill, or of any other paper from which the public could glean any information whatever as to the subject-matter of the threatened litigation. Where, however, the statute or a rule of Court requires the filing of a bill as a prerequisite of jurisdiction, there is, says Bennett (Lis Pend., sec. 18), "a warrant for using the terms 'notice *lis pendens*' and 'notice of *lis pendens*.'" And very plainly are these terms, as well as that of "constructive notice," permissible where, as in this State, the *lis pendens* can only exist, as to real property, by a strict compliance with the terms of the statute, and where the statute itself declares that the notice, when properly filed, shall be "constructive notice." *The Code,* §229. The fundamental principle of *lis pendens,* therefore, being no longer founded, in this State, upon a public policy which gives effect to the decrees of the Courts, regardless of the fact whether an inquiring purchaser can acquire information by an inspection of the record, but being founded upon the principle that by such an inspection he can actually acquire information, it must necessarily follow that the *lis pendens* is entirely dependent upon the filing of the notice; and, if this be so, it must also follow that its efficacy will be destroyed when it is substantially withdrawn by the consent of the parties. It is true that the notice, when filed, is, as in the case of the common law *lis pendens,* in itself notice, or rather dispenses with actual notice; but it was in consonance with the spirit long evinced by the courts of equity, to postpone the operation of the rule until the bill was filed, that these statutory provisions have been very generally enacted. While recognizing the *lis pendens* as absolutely binding in its effect, the rigor of the rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it.

These principles are easily applied to the facts appearing in the record. This action is entitled "Pattie D. B. Arrington against J. P. and B. L. Arrington, executors, and others"; and there appears nothing else on the docket from which the character of the action or names of the parties, other than the executors, can be ascertained. It is clear, therefore, that, in the absence of the complaint, there was nothing on the records of the Court which could amount to a *lis pendens* under our statute.

At the Fall Term, 1882, the following order, entitled as above stated, appears on the docket: "This cause, on motion of plaintiff, supported by affidavit, is removed; and, by consent of counsel for plaintiffs and defendants, Vance county is designated as the county to which it should be removed, and that the original papers in the cause be transmitted, instead of a transcript, and said cause not to be called before Thursday of the next term of Vance Superior Court." Thus it appears that all of the papers from which a purchaser could derive any information that the devisees of Arrington were parties, or that their land was to be subjected, were, by consent of all the parties who are interested in sustaining the *lis pendens*, virtually withdrawn from the files of the said Court. The complaint, so far as this question is concerned, was simply a substitute for the notice required by *The Code;* and its withdrawal, under the circumstances, had the same effect as the voluntary withdrawal of any other notice of *lis pendens*. It seems to us that it would be pushing the doctrine of statutory *lis pendens* far beyond its reasonable limits to enforce it in favor of those at whose instance every vestige of information required by the statute was removed, and against a purchaser who, for that reason, could not, by the most diligent inspection of the records, have discovered that the land he was purchasing was sought to be subjected to the payment of the indebtedness of the said estate. We are therefore of the opinion that there was error in the ruling that those of the defendants who purchased lands in Nash county after the removal of the cause were affected with constructive notice of the purpose of this action.

3. There being no *lis pendens* after the removal, it is insisted that, independent of the statutory *lis pendens*, a pending action or a judgment against the executors alone would, in itself, amount to constructive notice, and that the purchasers were thereby put upon inquiry to ascertain whether the estate was insolvent, so that a resort to the

real property would be necessary. As illustrative of this contention we may refer to the Nancy Bunn judgment, which was confessed in the Superior Court of Nash County in 1869 by the said A. H. Arrington, deceased, and revived against his executors in 1875. This judgment simply ascertained the amount of the indebtedness, and was no lien upon the lands at the time of the various purchases. It was not incumbent, therefore, upon the purchasers to examine the records for this judgment; and, unless they had actual notice of its existence, it could not put them upon inquiry as to the condition of the estate. After the lapse of two years purchasers, in the absence of actual or constructive notice, have a right to assume that the estate has been settled. Notice is either actual or constructive, but the line of demarkation between them is not always preserved; and, indeed, there is often a difference of opinion as to whether notice arising in a certain way belongs to one class or the other. "That notice which is imputed to a person because he is shown to be conscious of having the means of knowledge, although he does not use them, is treated by some Judges and text-writers as a branch of actual notice, and is called by them 'implied notice,' but by others it is treated as constructive notice. Generally this is not a matter of importance, for, when established, constructive notice has the same effect as actual notice." 1 Beach. Mod. Eq. Jur., 347. It is unnecessary at this time to attempt a classification, but reference may be made to Mr. Pomeroy's work on Equity, in which he treats the subject with much learning and ability. 2 Pom. Eq. Jur., sec. 5. Assuming it to be constructive notice, it is not, like *lis pendens*, notice in itself; but it is entirely dependent upon actual notice brought home to the party of such facts which, if followed up with reasonable care and diligence, would lead to a discovery of the truth concerning the claim or interest of another. When the information is of this character the constructive notice is irrebuttable, and as effectual as that species of constructive notice to which *lis pendens*, registration, and others of a similar conclusive character, belong. The cases cited by counsel do not conflict with this view, nor do they establish the proposition that a judgment of this nature, without actual notice of its existence, is constructive notice of the insolvency of the estate. Those purchasers, therefore, who purchased after the removal of the cause,.and who had no actual notice of the existence of the judgment, the pendency of this action or of the insolvency of the estate, will be protected, provided they are *bona fide* purchasers for value. The law favors the alienation of real property, and has fixed a limited period within which it must await, in the hands of the heirs or devisees, the possible demands of the creditors. After the expiration of this period it may be purchased with impunity by a *bona fide* purchaser for value and without notice. It is very improbable that a want of sufficient personal assets will not be discovered within two years after the administration, and the creditors may always, within a reasonable time, avail themselves of the statutory creditors' bill against the personal and real representatives.

It is not in accord with the policy of the law that the right which it gives the heir or devisee to convey after two years shall be impaired, as it will be if the purchaser is to be affected with constructive notice, under the circumstances relied upon in this case.

4. These general principles being established, we will now proceed to a more particular examination of the exceptions addressed to the rulings of the Court below.

First, as to the Hilliard tract: It appears that this tract had, under partition proceedings between the devisees, been allotted to John P. Arrington, and that on November 5, 1876, the said Arrington sold twenty acres thereof to one W. L. Thorpe, who had actual notice of the insolvency of the estate. The said Thorpe, on February 14, 1886, conveyed the lands to B. H. Bunn, trustee, who at the time of his purchase had actual notice of such insolvency, and also of the pendency of this action. There can be no question but that this land is not protected by the proviso of the statute, and that it should be subjected to the payment of the indebtedness of the estate, unless it is exonerated by reason of a certain deed of release executed by the plaintiff on the 30th of October, 1878; and that the said deed did not have this effect is decided in *Arrington* v. *Arrington*, 102 N. C., 491, and it is therefore unnecessary to enter into a further discussion of the question.

Second, as to the Marnes tract: This tract, in the partition proceedings, was allotted to R. W. Arrington, and conveyed by him to W. M. York on July 16, 1886. It is found that York was a purchaser for value, and that he purchased without actual notice. As the action had been removed to Vance county before the purchase, and as we have seen that such removal destroyed the *lis pendens* in Nash county, where the land is situated, it necessarily follows that there was error in holding that the said York and C. W. Grandy & Son, who purchased from him, were affected with constructive notice.

Third, as to the Fox and Harrison tract: This tract was also a part of the real estate allotted upon partition to R. W. Arrington, and it was sold and conveyed by him to T. F. York on the 28th of February, 1885, in consideration of the sum of $3,820. For this amount the said York executed his notes to the said Arrington, and immediately reconveyed the land to secure the payment of the same. As the sale was made after the removal of the action to Vance county there was no constructive notice, and it is found as a fact that York had no actual notice of any outstanding indebtedness of the estate. It is not suggested that the conveyance was made by R. W. Arrington for the purpose of defeating the claims of his father's creditors, nor that York knew of any such purpose, if, in fact, it existed. Purchasing, then, under such circumstances, thirteen years after the qualification of the executors, and, as found by the referee, for a fair price, we must assume that he purchased in good faith; and the chief question, therefore, which was argued by counsel and is to be determined by us, is whether he is a purchaser for value within the proviso of the statute. If he is such a purchaser it must follow that Jacob Battle, who purchased for value in 1889, as trustee, under a decree of foreclosure, would hold the land free from the claims of the creditors, although he had actual notice of the pendency of this action, and the insolvency of the estate. This principle—that a purchaser with notice, from one without notice, is protected by his vendor's want of notice—is a familiar one, and does not seem to be seriously questioned by counsel. *Bassett* v. *Norsworthy*, 2 White & T. Lead. Cas. Eq., 31, notes; 1 Bigelow, Frauds, 402; *Taylor* v. *Kelly*, 3 Jones' Eq., 240; *Wallace* v. *Cohen*, 111 N. C., 103. The inquiry, then, is, Was York a "*bona fide* purchaser for value," within the proviso of section 1442 of *The Code?* It is insisted by counsel that such a *bona fide* purchaser must be one who meets all of the conditions required in equity, and especially in that he has actually paid the purchase-money or its equivalent, or entered into some irrevocable obligation, or executed negotiable paper which has been transferred before maturity. *Southerland* v. *Fremont*, 107 N. C., 565. In other words, the whole of the purchase-money must have been substantially paid before notice; and if this is not done the purchaser takes the land impressed with the equity sought to be enforced, and is protected only *pro tanto*—that is, to the extent of the money actually expended prior to the notice. He must lose his bargain, however fair the price may have been at the time of the purchase, upon notice, perhaps many years afterwards, that the estate is insolvent. After very serious consideration, and a careful examination of the authorities cited, we have concluded that such is not a proper construction of the statute; and we are of the opinion that the purchaser contemplated by its provisions is, in respect to the consideration, to be assimilated to a purchaser for value under the statute of 13 Eliz. (*The Code*, §1548). The language of the two statutes, in so far as it bears upon this question, is substantially the same, the words "good consideration" having always been construed by the Courts of England and this country to mean "valuable consideration." 2 Bigelow, Frauds, 443, and *Young* v. *Lathrop*, 67 N. C., 63. And there is a striking analogy between a purchaser from an heir at law or devisee and a purchaser under the statute of Elizabeth, whereas there seems to be none between such a purchaser and a "*bona fide* purchaser" in equity. In the latter case the rule in equity, with its peculiar requirements, is usually invoked in favor of one who is seeking the enforcement of some equity which has attached to, or may, under various equitable principles, be impressed upon, the land; but it is never applied in favor of a mere general creditor, who possesses nothing in the nature of an equitable charge or lien. In the present case the creditors never had any lien upon the lands of the devisees (*Davis* v. *Perry*, 96 N. C., 260), but they had a legal right merely to subject the lands necessary to the payment of their indebtedness; and this legal right was absolutely protected for a period of two years by the provision of the statute declaring void any alienation by the real representative, as against such creditors. The creditors having nothing in the nature of an equitable charge or lien, their position after the expiration of two years must be regarded, in respect to the rights of purchasers, as similar to that of a general creditor, and the conveyances to such purchasers ought to be sustained upon the same consideration as would be sufficient under the statute of Elizabeth. This construction, as we have before remarked, is in harmony with the policy of the law, which condemns unnecessary restriction upon the alienation of real property. It can never work injustice to the vigilant creditor (and it is he, only, "whom the law loveth"); and it encourages alienation by the assurance it affords the purchaser that he can keep the land at the contractual price, leaving the creditor to subject the purchase-money, or its securities, in the hands of the vendor.

Under the view we have taken it only remains to be determined whether the defendant York was a purchaser for value under the statute of Elizabeth; and upon this point we have direct authority in the case of *Beasley* v. *Bray*, 98 N. C., 266, in which it was held that one who, in good faith, purchases property upon credit, at a fair price, of an insolvent debtor is a purchaser for value.

The principle declared is thus stated by Judge Seymour in his Digest: "The fact that an insolvent person makes a conveyance of all his property to a person possessing no other property of his own, and takes his notes in payment therefor upon long credit (one, two, and three years), is not sufficient, in the absence of a finding by a jury of fraudulent intent on the part of the vendee as well as the vendor, to authorize a Court to adjudge the conveyance fraudulent." The decision goes far beyond what is necessary to sustain the purchase in the present case, as it does not appear that the vendee was insolvent; and it is also to be observed that he did not give simply his notes for the purchase-money, but secured them by a mortgage on the property. It having been found that the said defendant purchased without notice, and in good faith, and the consideration being sufficient, we must hold that the exception to the ruling of the Court ordering the sale of the land purchased by him should be sustained.

Fourth, as to the home tract: The findings of the Court are as follows: "On the 6th day of January, 1881, T. M. Arrington and wife executed a deed to James T. Tisdale and his heirs for the 317 acres of the home tract allotted to said T. M. Arrington. None of the purchase-money has been paid, but Tisdale gave to Arrington his notes therefor, and, to secure the same, immediately reconveyed the land to Arrington, by way of mortgage. The mortgage deed was immediately registered in Nash county. The deed from Arrington to Tisdale was acknowledged and handed to the Register of Deeds. It does not appear that any fees were paid or tendered, or demanded, but the Register promised to register the deed. It has never been recorded and is lost. At the time Tisdale agreed to purchase the land, by mutual consent, John H. Thorpe acted as attorney for both Tisdale and Arrington; and Thorpe, between the years 1872 and 1877, acted as attorney for the executors of A. H. Arrington, and from that time till the 19th day of December, 1883, had actual knowledge of the judgment of Pattie D. B. Arrington against the estate of A. H. Arrington, mentioned in the pleadings. Prior to December, 1883, T. M. Arrington borrowed some money from R. H. Ricks, and executed his notes to Ricks therefor, and as collateral security deposited with him at the time of borrowing the Tisdale notes given for the purchase-money aforesaid. Tisdale remained on the land about three years, using the rents and profits; and on December 18, 1883, he, Arrington, and Ricks agreed that Ricks should take the land for the debt Arrington owed him—it being a fair price—and, in pursuance thereof, Ricks surrendered to Arrington his notes, and Arrington surrendered to Tisdale his notes, no part of which had been paid, and Tisdale made to Ricks a fee-simple deed to the land. On discovering that the deed to Tisdale had never been registered, Arrington and wife conveyed the land to Ricks by deed dated September 9, 1891, which was registered September 10, 1891. Before and at the time the said Ricks took the deed from Tisdale, he (Ricks) consulted the said John H. Thorpe in reference to the title to the said 317-acre tract. Ricks paid no fee to Thorpe in the matter, and no general retainer; but, being a neighbor, Ricks generally consulted Thorpe about his business, and so consulted him about this matter. The money loaned Arrington by Ricks—evidenced by Arrington's notes, which Ricks surrendered—and interest accrued, was a fair price for the land. Thorpe did not actually communicate his knowledge to Tisdale or Ricks, and they had no actual knowledge of the indebtedness, other than the knowledge of the attorney, Thorpe. Upon the foregoing special facts found the Court held that neither Tisdale nor Ricks was a *bona fide* purchaser of the said 317-acre tract, for value and without notice, and the said Ricks and Tisdale excepted."

Under the principles we have enunciated in considering the exceptions relating to the Fox and Harrison tract it is clear that, the price being fair, Tisdale and his grantee, Ricks, were both purchasers for value. Tisdale, however, having purchased before the removal of the cause, was, without reference to the knowledge of the attorney, affected with constructive notice; and the question is whether Ricks, who purchased from him some two years afterwards without actual knowledge, and after the removal, is also affected with notice. It is insisted that he cannot avail himself of the want of actual notice, because, at the time of his purchase, his grantor, Tisdale, had not acquired the legal title. This rule as to the acquisition of the legal title is frequently of very important application to the case of a *bona fide* purchaser in equity; but, as we have seen that such a purchaser is not contemplated by the statute, it becomes immaterial whether Tisdale acquired the strict legal title or not. The unregistered deed (to say nothing of the estoppel worked by the acceptance of the mortgage by his grantor) was a conveyance at least of the equitable estate, and not merely of an equity, and was good as against all persons except subsequent purchasers and creditors. It might be set up in equity, says RUFFIN, C. J., "whether voluntary or for value, and by it such an estate is conferred as may be sold under execution." *Price* v. *Sykes*, 1 Hawks, 87. "Its owner is a tenant of the freehold, and a recovery under a precipe against him would be good, and his widow may be endowed in the same." *Morris* v. *Ford*, 2 Dev. Eq., 412. Such a grantee is also deemed, in equity, to be seized of an equitable freehold. *Austin* v. *King*, 91 N. C., 286; *Ray* v. *Wilcoxon*, 107 N. C., 514. See also, *Jennings* v. *Reeves*, 101 N. C., 447. Arrington having the legal title, and not a mere equity, and Tisdale having acquired of Arrington the equitable ownership for a fair consideration, Tisdale must be deemed to have purchased under a conveyance, as mentioned in the statute; and Ricks is therefore entitled to avail himself of a want of notice, although his grantor, the said Tisdale, may have had notice.

Before passing from this subject it may be of interest to observe that it is not true that an unregistered deed is, as has been said, a mere executory contract, and that for this reason the title revests in the grantor upon redelivery. It is, as we have stated, a conveyance of an equitable estate; and such an estate in land, being within the statute of frauds, cannot be conveyed in such an informal manner. The reason that a grantee cannot claim under such a deed, when he has redelivered it, is because he will not be permitted to give evidence of that which he has voluntarily destroyed; and he is therefore estopped from ever setting it up, either in a court of law or equity.

It is further insisted by the learned counsel that Ricks was affected with constructive notice by reason of the knowledge of his attorney. It appears that Mr. Thorpe acquired his information of the indebtedness of the estate while acting as attorney for the executors between the years 1872 and 1877, and that this information was still in his mind at the time Ricks consulted him in 1883; but for some reason (perhaps because it did not occur to him that the real estate would ever be required to pay such indebtedness) he did not communicate his knowledge to Ricks. Very much was said on the argument in respect to the time and manner in which the knowledge must have been acquired by an agent, in order to affect his principal, it being insisted that it must have been acquired in the course of the particular transaction in which the agent was employed. There is an apparent diversity of opinion upon this point in the text-books and judicial decisions. See Pom. Eq. Jur., 666; 1 Jones, Mortg., 586; Weeks, Attys. at Law, 237, and the notes in *Le Neve* v. *Le Neve*, 2 White & T. Lead. Cas. Eq., 109—and also a discussion of the subject by BRADLEY, J., in the Case of Distilled Spirits, 11 Wall., 356. In the latter case the agent was authorized to purchase for the principal, and it was held that the latter was affected with notice present to the mind of the agent at the time of the purchase, although he had acquired his information in a prior transaction. This, with some limitations, seems to be the true rule in such cases. So, in the case of *Hulbert* v. *Douglas*, 94 N. C., 122, the point determined by this Court was that there was some evidence "that the attorney was acting for the purchaser in the sale of the note." Our case is quite different, and we do not propose to enter into an elaborate discussion of the general subject. It is sufficient to say that, conced-ceding that Mr. Thorpe was really consulted as an attorney, and not merely as a friendly neighbor, in reference to the title, he was not, in our opinion, such an agent as is embraced in the principle relied upon. Mr. Pomeroy (section 668) says (and in this he is fully sustained by the leading authorities) that, "whenever a solicitor or attorney at law is brought within the operation of the rule he must be employed in some other capacity than as a mere professional and legal adviser. He must be employed to represent his client in a transaction whereby the principal is to acquire some rights, or is to be subjected to some liabilities." And he further observes, in a note, that "all the decisions—impliedly, at least—sustain this conclusion. Whenever the agent has been a solicitor or attorney at law it will be seen that he has been employed in some such transactions—the negotiation of a lease and giving a mortgage, the transfer of property, and the like." To the same effect is the opinion of Judge Hare and Mr. Wallace in their notes in *Le Neve* v. *Le Neve, supra.* They remark that "one who is asked for a professional opinion is an adviser, rather than an agent. If an agent who is employed to invest money or to conduct the negotiation for an estate buys with notice that the premises belong, in equity and good conscience, to a third person, it is immaterial whether his knowledge was acquired at the time or in the course of an antecedent transaction. * * * But the case is obviously different where an attorney who has been retained to examine a title conducts the investigation in the usual course of business without discovering a break or flaw, and so informs his client, without disclosing a fact which he has learned incidentally in examining the same title for another party. Under these circumstances the purchase is not made through the agent, nor does he practice a fraud or deception on the equitable owner. His failure to disclose the truth may be wrongful, or it may be dictated by a sense of professional obligation to the person for whom he was acting at the time when he obtained the information. But there is nothing to affect the conscience of the principal, nor can he be said to have constructive notice of that which he would not have ascertained if he had examined the title instead of employing an attorney."

These principles, as applied to the facts before us, very plainly show that the knowledge of the attorney should not be attributed to Ricks. The attorney here was merely consulted as to the title, and does not appear to have been employed to negotiate the purchase, or to acquire the title. Ricks, then, having no constructive notice, either by *lis pendens* or the knowledge of the attorney, and being himself possessed of no actual knowledge, either of the indebtedness or of the judgment against the executors (which latter would have put him upon inquiry), is to be deemed, under the findings of the Court, a *bona fide* purchaser for value, and without notice. His exceptions, therefore, must be sustained.

Fifth, as to the Mann-Arrington Gold Mining tract: This tract was allotted in the partition proceedings to T. M. Arrington, who conveyed the same, on April 2, 1881, to J. P. Daughtry, as trustee, to secure certain indebtedness due Bunn, Battle & Co. This conveyance having been made before the removal of the action, the said Daughtry was affected with constructive notice. On November 3, 1884, he conveyed to B. H. Bunn. The action having been removed, the said Bunn had no constructive notice, but it is found that he had actual knowledge of the suit, as well as of the indebtedness of the estate. B. H. Bunn conveyed on November 26, 1886, to Bennett Bunn, who paid full value, and had neither actual nor constructive notice. Bennett Bunn, on January 27, 1888, conveyed for value to the Mann-Arrington Gold Mining Company, who had actual notice. Under the authorities cited in this opinion relative to the Fox and Harrison tract the Mann-Arrington Gold Mining Company are protected by the want of notice to their grantor, Bennett Bunn. The exception, therefore, must be sustained.

Sixth, as to the legacy of J. C. Arrington: We have examined the authorities cited by counsel, and are of the opinion that they do not sustain the position that the legatee is estopped from enforcing his claim simply by reason of the partition between the devisees. The legacy, however, is not a charge upon the land, in the sense that it can be enforced against those purchasers who, under the circumstances of this case, have purchased in good faith, for value, and without notice. The ruling of the Court, with this modification, is sustained.

Seventh, as to the statute of limitations: Under the views we have taken the statute of limitations is only material in respect to the Hilliard tract. The judgment against the executors was obtained on September 7, 1874, and this action was commenced at the Fall Term, 1879, of the Superior Court of Nash County. The statute ceased to run, from that time, as to all the parties, and those claiming under them. It is also to be noted that the purchasers had actual notice. The exception is overruled.

IN THE APPEAL OF S. L., A. H., AND J. C. ARRINGTON.

SHEPHERD, C. J.: This appeal relates solely to the mill tract, situated in Franklin county. The purchasers of this tract paid full value, and without actual notice. At the time of the purchase there was only a judgment against the executors in Franklin county. This judgment, we have seen in the discussion of the third general proposition in the opinion in the foregoing appeal, was not constructive notice, unless actual knowledge of its existence was brought home to the purchasers. The exception is overruled.

Both of these cases are remanded in order that judgments may be entered in accordance with the opinions of the Court, and it is so ordered.
Remanded.

ELIAS FORTE et al. v. JAMES D. BOONE et al.

Practice—Case on Appeal—Invalid Service by Constable—Amendment of Summons.

1. Service by an officer means an officer authorized generally and by virtue of his office to serve process of the Court in which the action is pending.
2. A town constable has no authority, under section 3810, as construed with section 644, to serve any papers for the Superior Court except process; an appellant's case on appeal from the Superior Court is not *process;* hence, service of a case on appeal by a town constable is a nullity.
3. Failure to serve a case on appeal on appellee legally and in due time cannot be cured by the action of the Judge below in thereafter settling the case.
4. Where there is no valid case on appeal and no error appears on the face of the record, the judgment below will be affirmed.
5. Where an action was brought on the official bond of a Clerk of the Superior Court in the name of the parties injured by a breach thereof, it was not error in the Court below to permit an amendment of the summons by the insertion of the words "The State on relation of" after the pleadings were filed.

FORTE *v.* BOONE.

CIVIL ACTION, tried before *Hoke, J.*, and a jury, at Spring Term, 1893, of NORTHAMPTON Superior Court.

From a judgment for the plaintiffs the defendants appealed. The pertinent facts are stated in the opinion of Associate Justice CLARK..

Mr. R. B. Peebles, for plaintiffs.
Mr. C. G. Peebles, for defendants (appellants).

CLARK, J.: The appellants' case on appeal, unless service was accepted, could be served only by an officer. *Allen* v. *Strickland*, 100 N. C., 225; *State* v. *Johnson*, 109 N. C., 852; *Clark* v. *Manufacturing Co.*, 110 N. C., 111; *The Code*, §597. Service by an officer means an officer authorized generally and by virtue of his office to serve process of the Court in which the action was determined. The service here was made by a constable and was a nullity. *The Code*, §3810, must be construed with section 644, and by them a town constable is given no authority to serve any papers for the Superior Court, except process, and that only when expressly directed to him by the Court. This does not embrace the case on appeal. This was not process, nor was it directed to him by any Court The action of the Judge in thereafter settling the case cannot cure the failure to serve appellants' case upon appellee legally and in due time.

There being no valid case on appeal before us, we are restricted to errors apparent upon the record proper. *Lyman* v. *Ramsour*, 113 N. C., 503. There being none, the judgment must be affirmed. We may note, however, that the exception that the Judge allowed the summons to be amended by adding the words "State on relation of" before the name of plaintiff was not error. *Maggett* v. *Roberts*, 108 N. C., 174. It might have even been allowed after verdict (*Brown* v. *Mitchell*, 102 N. C., 347), or, indeed, in this Court. *Hodge*

v. *Railroad*, 108 N. C., 24, 26; *Grant* v. *Rogers*, 94 N. C., 755; *Tyrrell* v. *Simmons*, 48 N. C., 187; *The Code*, §965. Nor is there any ground for exception to the issues. *Humphrey* v. *Church*, 109 N. C., 137, and cases cited. The judgment is Affirmed.

McNEAL PIPE AND FOUNDRY COMPANY v. WOLTMAN, KEITH & COMPANY.

Notary's Certificate of Acknowledgment of Deed—Mortgage of Partnership Property by one Partner—Affixing Seal to Partnership Name—Water-works Machinery and Franchise—Public Necessity of Sale of, together—Receiver—Time of Proving Claims.

1. The certificate of a Notary Public concerning the probate or acknowledgment of deeds is *prima facie* evidence of the truth of its pertinent recitals; hence a notary's certificate on a trust deed signed by "W., K. & Co." that it was "acknowledged by E. W., one of the firm of W., K. & Co., the grantors," is evidence of the fact that the deed was executed by a member of the firm.

2. A trust deed executed by one member of the firm in the firm name, with seal attached, is binding on the firm as a contract, though not as a deed.

3. A seal is not necessary to the due execution of a mortgage of personal property, and hence a seal affixed to the firm name signed to a deed of trust of personal property does not invalidate the conveyance.

4. Contractors for the construction of a city water-works plant for a water company gave a trust deed on the machinery to the seller, which provided that the machinery should not be considered as fixtures until the debt was paid; the machinery was placed on the ground provided by the company, but was not paid for; a receiver for the company was afterwards appointed, and proceedings instituted to wind up its affairs: *Held*, that public necessity required that the plant and the company's franchise should be sold together, and

that the deed should be a specific lien thereon, to the extent of the value of the machinery, except as to the claim of certain heirs having an interest in the land.

5. Though a day was set for all creditors of the company to come in and exhibit their claims, the Court could, in its discretion, allow further time, or permit creditors to prove their claims after such time, on showing reasons for failure to come in within the time fixed.

This was a CIVIL ACTION, tried before *Hoke, J.*, and a jury, at the Fall Term, 1893, of VANCE Superior Court.

The action was originally begun to recover $10,784.04 due the plaintiff from Woltman, Keith & Co., who had contracted to construct and equip a water-works plant at Henderson for the Henderson Water Supply Company, a corporation now defunct. There was a recovery by the plaintiff, and the water supply company and its bondholders came in as defendants, and by consent of all parties the action was converted into a creditor's suit to close up the affairs of the water supply company, and Henry Perry was appointed receiver, with authority to borrow money and to complete and operate the works, and also to ascertain the *bona fide* indebtedness of the water supply company. The receiver completed the works, and ascertained and reported the indebtedness of the water supply company and of himself as receiver, as recited in the judgment herein. The appellant, the Henderson Water Supply Company, was organized early in 1892 by the bondholders of the original water supply company, with J. Whit Wood as president and W. L. Granger as secretary, under chapter 165, Private Laws of 1887, as amended by chapter 7, Private Laws of 1891, for the purpose of acquiring the water-works plant then under construction, and on February 23, 1892, the original Henderson Water Supply Company conveyed to it by deed all its real and personal property. It became a party to this action on the 13th day of April, 1892.

In June, 1890, Woltman, Keith & Co. purchased of the Deane Steam Pump Company the pumping machinery claimed in this action for $4,200 and executed their promissory note therefor, and a deed of trust on all the machinery and tools to W. H. S. Burgwyn to secure its payment, dated June 25, 1890, in which it was provided that "said machinery, etc., is to be used by the water-works company at Henderson, in said county of Vance, and is to be erected on foundation prepared by parties of the first part (W., K. & Co.) from drawings furnished party of the third part (D. S. P. Co.), but said machinery is not to be considered as fixtures until said note or any renewal of the same, in whole or in part, shall be paid"; and said machinery was after that time placed by Woltman, Keith & Co. in a house prepared for it on ground provided by the Henderson Water Supply Company, appellant.

The receiver took possession of the machinery embraced in the deed of trust, and at February Term, 1893, the Deane Steam Pump Company, by leave of Court, became a party to the action and sought to recover from the receiver the possession of the machinery.

Upon the trial the Deane Steam Pump Company offered in evidence the deed of trust from Woltman, Keith & Co. to W. H. S. Burgwyn. Its admission was objected to on the ground that the probate was insufficient in that it does not show that the deed was executed by a member of the firm, and because it was executed in the firm name with a seal. The objection was overruled, and the appellant excepted.

It was admitted that Woltman, Keith & Co. were indebted to the Deane Steam Pump Company in the sum of $4,200, with interest from April 15, 1892.

Upon the pleadings the following issues were submitted to the jury and answered as set forth below:

"1. Did defendants, the Deane Steam Pump Company, or their trustee, W. H. S. Burgwyn, have a valid mortgage, duly registered, on the pumps and other property described and claimed in their answer? Answer, Yes.

"2. Did said defendants, after the execution of said mortgage, contract and agree for value with the McNeal Pipe and Foundry Company and other general creditors of the Henderson Water Supply Company and Woltman, Keith & Co. that they would not enforce their said mortgage lien, and that they would become a general creditor for the amount due them on said mortgage? Answer, No.

"3. Was said property, with the knowledge and assent of the Deane Steam Pump Company, or their trustee, annexed to the freehold of said plant as a part of the same and as a fixture thereon? Answer, Only so far as claim due Fox heirs is concerned.

"4. What was the value of the pumps and other property contained in said mortgage? Answer, $3,800.

"5. What amount has been borrowed and is now due and owing on receiver's certificates, contracted and given by order of Court, and to whom due? Answer, Amounts as shown by reports of receiver on file."

The said deed of trust was signed "Woltman, Keith & Co., (Seal)."

And the following certificate of probate was attached:

"I, John J. W. Stone, a notary public, do hereby certify that the execution of the foregoing instrument was this day acknowledged before me by Emil Woltman, one of the firm of Woltman, Keith & Co., the grantors. Witness my hand and notarial seal, this 29th day of November, 1890. JOHN J. W. STONE,

[Notarial Seal.] "*Notary Public, Keys Co.*"

The Court was of opinion that on the record the Fox heirs, owning the realty, could not be deprived of their supreme lien by special contract for machinery which might destroy their claim, but as to other contracts, etc., those claiming under Woltman, Keith & Co. were barred by their contract that the machinery should not be a fixture.

The fourth issue was submitted at the instance of the appellant, who contended that by reason of the use of the machinery sued for, in supplying the town of Henderson and its residents with water, public policy would not allow it to be severed from the plant. The Court, being of opinion that public necessity required that the plant and franchise of the water supply company should be sold together, sustained the contention of the appellant, and held that the deed of trust of the Deane Steam Pump Company should be a specific lien upon the property and franchise of the water supply company, to the extent of the present value of the machinery sued for, except as to claim of Fox heirs.

The appellant moved for judgment, notwithstanding the verdict, on the following grounds:

"That it appears that the property of the Henderson Water Supply Company has become bound to pay the condemnation price of the real estate, as well as the receiver's certificates issued by the receiver to borrow money to finish the works; that it appears that it was twelve months after the alleged foreclosure of the trust before the Deane Steam Pump Company made any effort to obtain possession of the pumps, and after the property of said Henderson Water Supply Company had become charged with the lien of the receiver's certificates; that having allowed the pumps to remain situated upon the lands of the Fox heirs, which said Henderson Water Supply Company had the right to have conveyed to it, and having allowed the possession of the pumps to pass into the hands of the receiver of this Court, it has the effect to place the Deane Steam Pump Company as a creditor of Henderson Water Supply Company; that it appears that the Deane Steam Pump Company did not have any contract of sale with the Henderson Water Supply Company, and are therefore only entitled to recover of said water company the value of the pumps, without priority, and as all other creditors are paid, said pumps being situated upon lands which the water company had the right to have conveyed to it in fee."

Motion overruled. There was judgment upon the verdict, and the Henderson Water Supply Company appealed and assigned as error:

"1. The admission of the deed of trust from Woltman, Keith & Co. to W. H. S. Burgwyn, trustee.

"2. In directing the answer to the third issue, and holding that said pumps were fixtures only so far as the Fox heirs were concerned.

"3. That having held the pumps to be fixtures so far as the Fox heirs were concerned, it was error not to hold said pumps were fixtures so far as the Henderson Water Supply Company was concerned, because the Henderson Water Supply Company claimed under the Fox heirs, and said Henderson Water Supply Company were bargainees through and by the Court of all the rights of the Fox heirs.

"4. The refusal to sign judgment upon the motion made by appellant, notwithstanding the verdict.

"5. By allowing the Deane Steam Pump Company to litigate their claim in this action after the filing of the report of the receiver, and in not holding that the Deane Steam Pump Company was barred by the report of the receiver, after the publication of notice for all parties to prove their claims against the Henderson Water-works, it having failed to come in and prove the same, and their debt having been found for the full amount of the same."

Messrs. T. M. Pittman and *W. B. Shaw*, for plaintiff.

Mr. J. H. Bridgers, for the Henderson Water Supply Company (appellant).

MACRAE, J.: Upon the trial the Deane Steam Pump Company offered in evidence the deed of trust from Woltman, Keith & Co. to W. H. S. Burgwyn. Its admission was objected to on the ground that the probate was insufficient. in that it does not show that the deed was executed by a member of the firm, and because it was executed in the firm name with a seal. The objection was overruled, and the appellant excepted.

The first ground of exception is untenable. By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law-merchant, and pertained to the presentment of bills of exchange for exceptance or payment and the protest thereof for non-payment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. *The Code*, §3307; §258; Act 1891, ch. 140. The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being *prima facie* true. *Elliott* v. *White*, 6 Jones, 98. With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is *prima facie* evidence of the truth of its pertinent recitals.

The second ground of exception to the admission of the deed in evidence was that it was executed in the firm name with a seal, the contention of appellant's counsel being that there is no evidence as to which of the parties signed the paper, and hence it cannot be treated as the act of a single member and the simple contract of the firm; and if not a simple contract, then it must be a nullity. It is a general rule that one partner may bind his copartner by a contract in the name of the firm within the scope of the firm business, and it is also a general rule that a partner cannot bind his copartner by deed without express authority. 1 Parson Con., sec. 12. It will not be necessary to advert to the exceptions to and refinements upon these rules.

A seal is not necessary to the due execution of a mortgage of personal property. The property will pass by the conveyance made by one partner in the name of the firm where the conveyance is made in trust to secure the payment by the firm of the purchase price of the articles so conveyed, this being clearly within the scope of the partnership business. For the general doctrine, see Jones on Chattel Mortgage, 46.

"As a mortgage of personal property need not be under seal, and as a mortgage of such property of a firm made by one of the partners to secure a debt of the firm is valid, the addition by him of a seal does not vitiate it." Herman on Chattel Mort., sec. 118. The rule that an agent cannot bind his principal by a sealed contract, without authority under seal to do so, applies to such transactions wherein a seal is indispensable; but in the present case the seal was of no importance and the affixing of the same did not invalidate the conveyance. *Sweelzer* v. *Mead*, 5 Mich., 107; *Milton* v. *Mosher*, 7 Metc., 244. This seems to be the doctrine as laid down in the text-books and in some other States.

It has been held in this Court (*Burwell* v. *Linthicum*, 100

N. C., 145) that where a contract entered into by an individual and a copartnership is reduced to writing and signed and sealed by the individual, and the firm name is signed and a seal put after it by a member of the firm, the instrument is the covenant of the individual and the simple contract of the firm. Chief Justice SMITH, in a learned opinion, reviewing the authorities, says: "The agreement shows clearly that the partnership and not an individual member was intended to be bound, and it was at most, if effectual at all, a parol contract with the firm." The older decisions in North Carolina which held to a stricter rule were applied to cases under the old practice where there were different forms of actions, and the question generally was whether an action of *debt* would lie, or it should have been brought in assumpsit. *Fronabarger* v. *Henry*, 6 Jones, 548; *Fisher* v. *Pender*, 7 Jones, 483. These distinctions having been abolished, we see no good reason why the defendants, Woltman, Keith & Co., and all claiming under them, should not be bound by the contract which one partner had a right to make, though not by deed.

The second, third and fourth exceptions, all turning upon the question whether the property sought to be recovered by the Deane Pump Company is fixtures, are rendered immaterial by the view taken by his Honor, in which we concur, that public necessity required that the plant and franchise of the water supply company should be sold together, and that the deed of trust, as it is called, of the Deane Pump Company should be a specific lien upon the property and franchise of the water supply company to the extent of the present value of the machinery sued for, except as to the claim of the Fox heirs—no exception being taken thereto by the Deane Pump Company.

The fifth exception is not tenable. Although a day was set for all creditors to come in and exhibit their claims it was entirely within the discretion of the presiding Judge to allow further time or to permit creditors to prove their claims upon proper representations to him of reasons why such creditors had not come in before the prescribed day. It abundantly appears in this case that the property sought to be recovered was sold to Woltman, Keith & Co. for use in the water-works system of Henderson, and passed into the possession of the water supply company, and thence into the hands of the receiver; that it is an important and indispensable part of the water supply plant, and that the public interest will not permit it to be taken away; and it further appears that the Deane Pump Company has never been paid for the said machinery. The law would be weak indeed if it were unable to afford such relief as the seller is entitled to have, and we think his Honor in his judgment has found a just and equitable solution.

No Error.

W. S. CARTER et al. v. S. A. LONG et al.

Ejectment—Effect of Satisfaction by Defendants in Ejectment of Judgment for Value of Land—Warranty—Mutual Warranties.

1. Where, under section 484 of *The Code*, the plaintiffs in an action of ejectment elect to accept the valuation of the land fixed by the jury and the defendants satisfy the judgment, the effect of such satisfaction is to evict the defendants as heirs of an ancestor under whom they claimed and immediately to invest them with the title as purchasers from the plaintiffs and they thereafter do not hold as heirs of their ancestor.
2. In such case the defendants, having been evicted as claimants under their ancestor, may recover on the broken general covenant of warranty which a grantor had made to such ancestor and his heirs.

3. Where there have been a conveyance and reconveyance of land with covenants of warranty, in order that they may cancel each other, they must be *like* covenants; therefore, where C. conveyed to S. with *special* warranty and S. reconveyed to C. with general warranty the covenants do not mutually cancel each other, and, upon eviction by a stranger under a paramount title, C. or his heirs may recover damages for the breach from S. or his heirs.

This was a SPECIAL PROCEEDING brought before the Clerk of the Superior Court of HYDE County, and, upon issues raised on the pleadings, it was transferred to the civil issue docket and tried before *Graves, J.*, and a jury, at Fall Term, 1893, of said Court.

The pertinent facts are stated in the opinion of Associate Justice BURWELL.

The issues submitted to the jury and the responses thereto were as follows:

"1. Did David Carter convey to Caleb Spencer, as alleged by defendant? Answer, Yes, as set out in the deed, September 1, 1847.

"2. Did assets descend from the said David Carter to the plaintiffs, and to what amount? Answer, Real estate, $50,000; personal, $10,000 or more.

"3. What price did Caleb Spencer pay David Carter for the land? Answer, $1,250.

"4. What price did David Carter pay to Caleb Spencer for the reconveyance of the land described in deed of September 1, 1847? Answer, $3,000.

"5. Has the warranty in the deed from Caleb Spencer to David Carter been broken? Answer, Yes.

"6. What damages have plaintiffs sustained thereby? Answer, None.

"7. Has the warranty in the deed from David Carter to Caleb Spencer been broken? Answer, Yes.

"8. What damages have the defendants sustained by reason of the breach? Answer, None.

"9. Is the defendant S. A. Long, administrator *d. b. n.* of Caleb Spencer, indebted to the plaintiffs, and if so, in what amount? Answer, Nothing."

Upon the sixth, seventh and ninth issues his Honor charged:

"As to the sixth issue, your answer should be "None," for it is shown to you that David Carter conveyed to Caleb Spencer in 1847 with a warranty, and that the plaintiffs claim under David Carter, and they are not entitled to any damages, for they are estopped and rebutted by the deed of their ancestor." (To this part of the charge the plaintiffs excepted).

"Upon the seventh issue the defendants insist that they have shown that there was a better title than the Carters' in the Borden heirs, and that they established that better title. You will then answer that issue, Yes." (To this part of the charge the plaintiffs excepted).

"As to the ninth issue, under the rules of law estopping the plaintiffs and rebutting them, the defendant Long, as administrator, is not indebted to plaintiffs." (To this part of the charge the plaintiffs excepted).

There was judgment for the defendants upon the issues as found by the jury, and plaintiffs appealed.

Mr. Charles S. Warren, for plaintiffs (appellants).

No counsel *contra.*

BURWELL, J.: The plaintiffs are the heirs at law of David Carter. In the year 1847 he purchased of one Borden a tract of land containing one hundred acres and took a deed conveying said land to him in fee and containing full warranties. In 1847 he sold fifty acres of this land to Caleb Spencer (whose administrator and heirs are defendants in this action) and executed to him a deed in fee-simple, in which deed he put the following words: "To have and hold the above described land with all the rights and titles I purchased of the said James W. Borden, and I hereby agree to warrant the right and title of the same from me, my heirs and assigns, forever." In the year 1851 Caleb Spencer conveyed to David Carter a tract of three hundred acres, including the aforesaid fifty acres, and in his deed put the following words: "To have and to hold the above described land and premises, together with all and singular the rights, privileges and appurtenances * * * to him, the said David Carter, his heirs and assigns, forever, and I, the said Caleb Spencer, do covenant and agree that I am lawfully seized and possessed of the aforesaid land and premises, and have full power to sell and convey the same in manner and form aforesaid, and do by these presents bind myself, my heirs and executors or administrators, to warrant and forever defend the same against the lawful claim or claims of any and all persons whatsoever."

David Carter had possession of this land at his death, holding the same under his deed from Spencer above mentioned, and his heirs held it when the children of James W. Borden brought suit in the year 1888 to recover the one hundred acre tract conveyed to David Carter in 1847, as stated heretofore, alleging that James W. Borden had therein only an estate for life, and that upon his death, which had occurred, the land became theirs. To that suit none of the defendants were parties. In that cause there was a verdict declaring that the plaintiffs (the Bordens) were the owners of the land; that the defendants (the Carters) unlawfully withheld the possession from them, and that the value of the land, "exclusive of betterments," was fifteen hundred dollars. The one hundred acres thus recovered by the Bordens included the fifty-acre tract conveyed, as heretofore stated, by Carter to Spencer, and by Spencer to

Carter. According to the provisions of section 484 of *The Code* the plaintiffs signified their election to accept the sum fixed by the jury as the value of the land, "exclusive of betterments," and therefor to relinquish their estate in the premises to the defendants, the Carter heirs. A judgment was entered in accordance with this verdict and election, and the defendants, the Carters, afterwards paid the same and thereby acquired the title that the Borden children had to the whole tract of one hundred acres. They seek here to recover one-half the sum so paid by them, and no more.

It is to be noted here that the legal effect of this judgment and its satisfaction by the plaintiffs in this action was to evict them from the land as heirs of David Carter, Spencer's vendee, and immediately to invest them with the title of the Bordens and their right of possession. Thereafter they held the land not as heirs of Carter, but as purchasers from the Bordens. The fact that they own and possess the land does not affect favorably or unfavorably their cause of action asserted in this suit. As heirs of Spencer's vendee they claimed the land. That claim proving ineffectual against the Bordens, as they allege, they have been forced to abandon that claim, and as heirs of Carter, Spencer's vendee, with full general warranty, they insist that, because of their eviction from the land, Spencer's covenant, made not only with Carter, but also with Carter's heirs, was broken, and immediately there arose in their favor a cause of action for damages, which they are asserting here.

It seems to be conceded by the defendants that if the plaintiffs were really evicted by those having a superior title the estate of Spencer would be liable to them for damages on the covenants contained in his deed to Carter but for the fact that Carter had himself conveyed the premises to Spencer, and their contention seems to be that the plaintiffs, being heirs of

Carter, are estopped by his deed to Spencer from bringing an action on the covenant in Spencer's deed to him. Or, to put their contention in another phase, they seem to insist that these mutual covenants between Carter and Spencer in effect cancel one another. This would no doubt be true if the covenants were alike. For illustration: If A for one thousand dollars conveys land to B with general warranty, and B afterwards conveys it back to A for one thousand dollars with general warranty also, and A is evicted by a stranger whose title is paramount and who does not claim under B, the former (A) will not be allowed to maintain an action for damages on the covenant contained in B's deed to him. One reason for this rule is the prevention of circuity of actions. *Silverman* v. *Loumis*, 104 Ill., 137. The recovery of A against B, if allowed under the circumstances detailed above, would itself give to B an identical cause of action against A. To avoid such result the rule which is supported by the authorities above cited declares that the covenant in the one deed cancels that in the other. "Where, after a conveyance with covenants, the same premises are reconveyed to the grantor by his grantee with *like* covenants, the law construes such covenants as mutually canceling each other, so that no action can be maintained on them by either of the parties or their assignees." 2 Warville on Vendors, 429. If the deed from Spencer to Carter had contained no warranty at all, it would yet have effected an extinguishment of Carter's warranty to him, for such a conveyance would have worked an assignment of Carter's obligation to himself, and a man cannot warrant land to himself or be an assignee of himself. Coke on Littleton, sec. 743; *Brown* v. *Metz*, 33 Ill., 339. But to effect this result they must be *like* covenants. If A's covenant with B is a special warranty only against himself and his heirs, while B's covenant is a general warranty against all persons whatsoever, the eviction of A by a stranger, as stated above, works a breach of B's covenant with A, but no breach of A's covenant with B. In such case A could recover of B, his covenant being broken, but then B could not recover of A, for his covenant had not been broken.

Applying what has been said to this case, we find that the covenant in Carter's deed to Spencer is not *like* that in Spencer's deed to Carter. The latter's covenants, upon which the plaintiffs rest their action, is a full general warranty against all persons whatsoever. The former's covenant is a special warranty against the covenantor and his heirs and against no one else. The eviction of the Carter heirs by the Bordens, if the title of the latter was paramount as alleged, worked a breach of Spencer's covenant with Carter and his heirs. That eviction did not work a breach of Carter's covenant with Spencer and his heirs and assigns, for the Bordens were strangers to Carter and to his title.

It follows from what has been said that there was error in the instructions given to the jury upon the sixth, seventh and ninth issues. Upon the evidence introduced the seventh and eighth issues should not have been submitted to the jury, and, upon the facts established by the verdict on the third, fourth and fifth issues, there should have been a judgment for plaintiffs for the sum demanded in the complaint, that being much less than the purchase-money paid by Carter to Spencer. Error.

W. A. DEANS v. SALLY PATE.

Deed—Probate by Clerk—Notary's Seal—Contingent Right of Dower and Homestead.

1. Where an acknowledgment of a deed was made before an officer authorized to take it and was, in fact, in due form, the adjudication by the Clerk of the Superior Court of the county where the land lies that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," is sufficient although not following the words of the statute (*The Code*, §1246 [3]) that it is in "due form."
2. The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of a deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer."
3. Where the only interest that a *feme* defendant in an action by the grantee of her husband and herself to recover the land is her contingent right of dower, her failure to sign the deed or to be privily examined will not affect the right of the plaintiff to recover.

CIVIL ACTION to recover possession of land, tried before *Shuford, J.*, and a jury, at October Term, 1893, of WAYNE Superior Court.

The plaintiff offered in evidence a deed purporting to be from R. B. Pate to W. A. Deans, dated May 12, 1892. The wife's name appeared in the body of the deed, but was not signed thereto.

The following certificates were appended to the deed:

"STATE OF NEW YORK—New York County.

"I, Geo. Theo. Sommer, do hereby certify that R. B. Pate personally appeared before me this day, and acknowledged the due execution of the annexed deed.

"Witness my hand and seal, this 23d day of May, 1892.
"GEO. THEO. SOMMER,
"*Notary Public, Kings Co.*"
"Certified in New York Co."

"NORTH CAROLINA—Wayne County.

"I, C. F. Herring, C. S. C., do hereby certify that the foregoing instrument has been duly proven, as appears from the foregoing seal and certificate. Let the same, with said certificates, be registered.

"Witness my hand and official seal, this 20th day of July, 1892. C. F. HERRING,
"*Clerk Superior Court.*"

The defendant objected to the introduction of said deed on the ground that the same purports to have been proven before Geo. Theo. Sommer, a notary public of the State of New York, and was not authenticated by his seal, but, on the contrary, purported to be authenticated by the notarial seal of Theo. Sommer.

The plaintiff stated that he had no evidence that the said Geo. Theo. Sommer is the same person as Theo. Sommer, except such as might appear from the deed itself and the certificate of the Clerk.

The defendant further objected to the introduction of said deed on the ground that the certificate of probate did not appear to have been adjudged to be in due form by the Clerk of the Superior Court of Wayne County. The Court, being of opinion with the defendant, sustained the objection and excluded the deed, and the plaintiff excepted.

The plaintiff thereupon offered to prove that the signature to the deed was in the handwriting of R. B. Pate, and that the deed was delivered to the plaintiff by said Pate, and to prove further that the defendant is his wife, and claims possession of the land by virtue of her marital rights. The Court, being of opinion against the plaintiff, excluded the evidence, and the plaintiff excepted.

The plaintiff then stated to the Court that the said deed was a necessary link in his claim of title, and without it he could not recover, and thereupon submitted to a nonsuit and appealed.

Messrs. Allen & Dortch, for plaintiff (appellant).
Mr. W. C. Munroe, for defendant.

CLARK, J.: The adjudication by the Clerk of the Superior Court of Wayne that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute (*The Code*, §1246 [3]) in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and "will be upheld without regard to mere form," as was said in *Devereux* v. *McMahon*, 102 N. C., 284. The acknowledgment was before an officer authorized to take it and probate was in fact in due form. The omission, therefore, of the Clerk to adjudge in just so many words that the probate was "in due form" when in substance he did so adjudge, was not sufficient ground to exclude the deed.

The notary public used a seal as his own. The statute does not require that his name, or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary.

If the only interest the *feme* defendant had in the land was her contingent right of dower, her failure to sign the deed or be privily examined would not affect the right of the plaintiff to recover at this juncture, since the grantor being a non-resident no right of homestead is involved. Should the *feme* defendant survive her husband her right to dower would then arise. *The Code*, §2106, and cases cited. Or, if she has other interest in the premises than the inchoate right of dower, she can assert it on the trial.

In excluding the deed upon the above grounds the Court erred. The nonsuit must be set aside to the end that there may be a New Trial.

H. WEIL & BROS. v. J. H. THOMAS et al.

Action to Foreclose Mortgage—Husband and Wife—Mortgage of Wife's Land as Security for Husband's Debt—Principal and Surety—Exoneration of Surety Land.

1. A married woman, who has mortgaged her land as security for her husband's debt, has the rights of a surety as to the liability thus imposed on her property, and is entitled to have all of her husband's estate included in the mortgage exhausted to the exoneration of hers; she may also object to the diversion of funds that should have been applied on the debt to her exoneration, if made without her consent.
2. In such case the heirs of the wife are entitled to the same protection.

CIVIL ACTION for the foreclosure of a mortgage, heard by *Connor, J.*, at April Term, 1892, of WAYNE Superior Court, upon an agreed statement of facts, which was substantially as follows:

The defendant J. H. Thomas, being indebted to the plaintiffs in the sum of $1,382.60, executed to them his bond therefor, dated 13th of December, 1880, payable on January 1, 1882, with interest at eight per cent., and to secure the payment of the same he and his then wife, Sarah J. Thomas, conveyed to the plaintiffs, by way of mortgage with power of sale, two tracts of land, one known as the "Hinson Tract," containing 192 acres, which was the separate property of the wife, Sarah J. Thomas, and the other known as the "Sand Hill Tract," containing 400 acres, the property of said J. H. Thomas. During the year 1882 Thomas paid on the bond at various times the aggregate sum of $318, which was duly credited.

In December, 1883, J. H. Thomas and wife sold and conveyed 100 acres of the "Sand Hill" tract to William Grant for $400, which was paid to the plaintiffs, who applied it, with the consent of J. H. Thomas, to another debt which he owed them not included in the mortgage.

During the marriage of J. H. Thomas and Sarah J., his wife, only one child was born, which died prior to the death of Sarah J., who after the conveyance of the 100 acres died, leaving as her heirs at law the defendants other than J. H. Thomas and Lucy J. Thomas, with whom he afterwards intermarried.

On the 14th day of December, 1886, the plaintiffs, pursuant to the power of sale in said mortgage, sold the said lands, other than the 100 acres sold as aforesaid, at public auction at the court-house door in Goldsboro, after due advertisement, when and where James Long bid off said "Hinson Tract" at the price of $1,100, and thereafter one R. G. Powell bid off the "Sand Hill Tract" at the price of $500. The plaintiffs executed deed for the said tracts to Long and Powell, reciting as the consideration therefor the sums bid by the said grantees respectively.

The purchase by Long was merely colorable and not a *bona fide* purchase. He became the purchaser by arrangement between J. H. Thomas and H. & S. Weil, under an agreement to convey the land to J. H. Thomas, and no part of the sum recited to have been paid by Long to H. & S. Weil was ever paid or intended to be paid. On the same day Long conveyed said land to Thomas, reciting the receipt of $1,100 as the consideration therefor, no part of which was ever paid, or intended to be paid. The whole transaction had for its purpose the vesting of the title to the lands in J. H. Thomas and enabling him to convey the same in mortgage to the plaintiffs, and this purpose was known to and participated in by H. & S. Weil. Upon the said 14th day of December, 1886, R. G. Powell conveyed to the said J. H. Thomas the land so purchased by him, and on the same day Thomas and wife, Lucy J., executed to the plaintiffs a mortgage upon both of the above-mentioned tracts of land to secure an indebtedness of the said J. H. Thomas to H. & S. Weil and E. Rosenthal, in which was included the part of the note of said December 13, 1880, then unpaid, which is the mortgage set forth in the complaint.

Payments were made on the said note last mentioned as follows: January 11, 1887, $73.53; January 15, 1889, $250.16; January 4, 1890, $125.08; May 9, 1891, $103.47. At the time of the said sale the said "Hinson Tract" was worth $2,000.

Upon the foregoing agreed statement of facts his Honor found that the defendant was indebted to the plaintiffs in the sum of $1,752.96, of which $700 was the balance due on the note secured by the mortgage which J. H. Thomas and his wife, Sarah J., executed in 1880, and as such was a charge upon the Hinson tract as against the heirs of Sarah J., subject to which charge the defendant J. H. Thomas had a life estate therein, which (subject to the charge of the $700) he and his wife, Lucy J., had conveyed to the plaintiffs. It was therefore adjudged as follows:

"That the life estate of the said John H. Thomas be sold by the commissioner hereinafter appointed, upon the terms herein set forth for the payment of the said charge of $700, with interest thereon at eight per cent. from April 18, 1892, and that if the said life estate shall sell for more than said $700 the excess shall be applied first to the payment of the costs of this action and then to the balance due the plaintiffs upon the judgment herein; and if the same shall not sell for the said $700 then the said commissioner shall proceed to sell the reversionary interest in the said Hinson tract to pay any balance of said $700 that the sale of the said life estate shall fail to discharge.

"It is further considered and adjudged by the Court that the said 'Sand Hill Tract' be sold by said commissioner for the payment of the sum of $1,052.96, the amount of the judgment herein, after deducting the said $700, or so much of said $1,052.96 as shall remain after applying to the same any excess of the proceeds of the sale of the life estate over the said $700 and costs.

"It is further considered and adjudged that costs of this action, if the sale of the said life estate shall not realize a sufficient sum to pay said $700, interest and costs, be paid out of the fund in the proportion that the proceeds of sale of the 'Hinson Tract' bear to the proceeds of the sale of the 'Sand Hill Tract.'"

Messrs. Allen & Dortch, for plaintiffs (appellants).
No counsel *contra*.

BURWELL, J.: We find no error in the judgment to which the defendants except. It conforms to the principle announced in *Shinn* v. *Smith*, 79 N. C., 310; *Davis* v. *Lassiter*, 112 N. C., 128, and *Hinton* v. *Greenleaf*, 113 N. C., 6, and cases there cited.

According to these authorities a married woman who has mortgaged her land to secure the payment of a debt of her husband has the rights of a surety as to the liability she has thus imposed on her property, and can require that all of her husband's estate that is mortgaged to secure the debt shall be exhausted before her land is sold, and she has a right to object to the diversion of funds that should have been applied on the debt to her exoneration, if such diversion was made without her consent.

She being dead, her heirs are entitled to like protection. It is proper and just that all the husband's interest in the land covered by the mortgage should be exhausted before the estate of her heirs therein shall be taken and sold.

Affirmed.

J. W. PIPKIN v. W. D. ADAMS et al.

Judgment—Lien—Expiration—Revivor.

1. The statute (section 440 of *The Code*) contains no provision extending beyond ten years the lien of a judgment until a motion to revive it and to issue execution theron can be heard; therefore,
2. Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who *bona fide* bought the land during the ten years.

Civil action for the recovery of land, tried before *Battle, J.*, and a jury, upon the usual issues, at November Term, 1893, of Harnett Superior Court.

The plaintiff claimed under a deed from the Sheriff of Harnett county made in pursuance of a sale on 7th of April, 1890, under execution issued on February 25, 1890, on a judgment rendered in the Superior Court on the 16th of February, 1880. Notice to revive the judgment and for leave to issue execution was issued in December, 1889, and heard and granted by the Clerk on the 17th of February, 1890.

The defendant claimed under a *bona fide* conveyance from the judgment debtor, W. B. Surles, and his wife, dated March 3, 1883.

Under the instructions of his Honor the jury rendered a verdict for the defendants, and plaintiff appealed.

Mr. L. B. Chapin, for appellant.

No counsel *contra.*

SHEPHERD, C. J.: Assuming for the purposes of this appeal that a docketed judgment for costs (the amount not being specified) is efficacious to confer a lien under section 435 of *The Code*, we are nevertheless of the opinion that the plaintiff cannot recover.

It is well settled that the lien of a docketed judgment expires at the end of ten years, and there is no saving clause in the act, except where the judgment creditor has been restrained from proceeding to enforce his judgment "by an order of injunction, or other order, or by the operation of an appeal, or by a statutory prohibition." *The Code, supra; Adams* v. *Guy*, 106 N. C., 275.

It is plain that these provisions do not apply to the present case. The plaintiff could have issued executions every three years and thus have avoided the necessity of resorting to a motion. *The Code*, §440. He failed to do this, but waited until only a month or two before the expiration of the lien and then moved for leave to issue execution. In thus delaying to enforce his rights he must abide the consequences. The statute contains no provision extending the lien until the motion is heard, and it is in the interest of public policy that it should be strictly construed. That such has been the principle adopted by this Court is manifest from the case of *Spicer* v. *Gambill*, 93 N. C., 378. In that case an execution was levied on land before the expiration of the judgment lien, but the sale did not take place until after the expiration of such lien. It was held that the levy did not extend the lien to the sale so as to defeat a purchaser whose right attached during the existence of the lien. See also, *McDonald* v. *Dickson*, 85 N. C., 248; *Lytle* v. *Lytle*, 94 N. C., 683, and other cases cited in Clark's Code (second edition), sections 435–440.

These authorities are conclusive against the plaintiff. The defendant purchased during the ten years, and at its expiration there was no lien upon the property. The purchase of the land by the judgment creditor under an execution subsequently issued conferred no title as against the defendant.

This view renders it unnecessary to consider the other questions discussed by counsel. Affirmed.

Z. W. HAYNES, Administrator of John W. Haynes, deceased, v. THE RALEIGH GAS COMPANY.

Action for Damages—Death Resulting from Wrongful Act—Negligence—Prima Facie Case—Burden of Proof—Contributory Negligence—Degree of Care to be Exercised by Persons or Corporations Using Electric Wires on Streets.

1. It is the duty of a corporation or others using the streets of a city, by permission of the municipal authorities, for purposes of private gain, to so conduct their business as not to injure persons passing

along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy.

2. Negligence being a failure of duty, proof that a "live wire" carrying a deadly current of electricity was hanging over and lying upon a sidewalk, and that it had been placed above the street by and was the property of the defendant corporation and was under the control of the servants of the latter, and that by contact with such wire a person, having a right to be on the street, was killed, constituted a complete *prima facie* case of negligence, and the burden was put upon the defendant to show that the wire was not down through any negligence of itself or its servants or agents.
3. Where, in the trial of an action for an injury resulting in death and caused by the alleged negligence of defendant, it appeared that the deceased, an intelligent boy ten years old, while walking on the sidewalk of a street, grasped a "live" guy wire hanging to the street and belonging to the defendant, and was killed by the contact, and there was no visible indication that the wire was charged with electricity: *Held*, that the trial Judge should have told the jury that there was no evidence of contributory negligence on the part of the deceased.
4. The utmost degree of care in the construction, inspection and repair of wires and poles is required of those who are allowed to place above the streets of a city wires charged or likely to be charged with a deadly current of electricity, so that travelers along the highways may not be injured by defective appliances.
5. The fact that an electric street railway company had caused it to be stated in a newspaper published in the city where it operated that its electric current was not a deadly one did not excuse an electric light company whose wires were stretched on the same street from using proper care in insulating its own wires against those of the street railway, and the admission of such statement on the trial of an action against the electric light company for damages caused by its negligence was erroneous, because of the irrelevancy of such testimony.

CIVIL ACTION by Z. W. Haynes, administrator of John W. Haynes, against the Raleigh Gas Company for damages for causing the death of plaintiff's intestate and son, tried at October Term, 1893, of WAKE Superior Court, before *Shuford, J.*, and a jury.

The damages were laid at $10,000. The pertinent facts are stated in the opinion of Associate Justice BURWELL.

The issues submitted were as follows:

"1. Was the plaintiff's intestate, John W. Haynes, killed by the negligence of the defendant?

"2. Did the plaintiff's intestate by his own negligence contribute to the injury?

"3. What damage has plaintiff administrator sustained?"

The jury responded "No" to the first issue, and from the judgment thereon for the defendant the plaintiff appealed.

Messrs. Battle & Mordecai, W. N. Jones and *Strong & Strong*, for plaintiff (appellant).

Messrs. Busbee & Busbee, Armistead Jones and *R. O. Burton*, for defendant.

BURWELL, J.: John W. Haynes, the intestate of the plaintiff, was about ten years of age. He was "a very healthy, intelligent, moral and industrious boy, well educated for his age." On the morning of November 15, 1892, he assisted his older brother, who was a carrier for a newspaper, and when returning home, about seven o'clock, he took hold of a wire on or near the sidewalk over which he was passing and was killed by an electric current. The place where this occurred was on North street, not far from its intersection of Blount street, in the city of Raleigh. The cause of his death is admitted, and also the fact that the deadly current came from the "feed wire" of the street railway company, whose line was constructed along Blount street, as were also the electric light wires of the defendant. One of the defendant's poles stood on Blount street and was supported by three guy wires—one attached to a tree on Blount street, and the other two to trees on

North street. The first of these guy wires (the one that was attached to the tree on Blount street) crossed and was in contact with the "feed wire" of the railway company. The longer one of the other two had become detached from the tree on North street and was hanging to the ground. The current passed along these two guy wires and killed the boy as soon as he grasped the one that had fallen on or near the sidewalk.

These facts were testified to by the plaintiff's witnesses and seem not to have been controverted.

Among the special instructions asked by plaintiff was the following: "Upon the evidence of the plaintiff, if believed, there is a presumption of negligence upon the part of the defendant, and in that case the burden is upon the defendant to show that there was no negligence on its part." His Honor refused so to instruct the jury, and the plaintiff excepted.

Pretermitting for the present the consideration of the question whether the boy was guilty of contributory negligence in taking hold of the wire, we are brought by this exception to the inquiry, Does the expression *res ipsa loquitur* apply to the state of facts set out above, and do those facts make out a *prima facie* case of negligence against the defendant, and cast upon it the burden of showing that it was not negligent?

Argument and authority are not needed to show that those who use the streets of a city, by permission of those who have power to grant such privilege, for purposes of private gain, owe to persons upon such streets the duty of so conducting their business as not to injure them. To speak particularly of the matter now under consideration, the defendant company, using the streets of the city of Raleigh for its purposes as it was allowed to do, owed to the deceased the duty of keeping out of his way, as he went about his business and to his home, all its wires, and especially the duty of preventing his exposure to contact with any wire placed in the streets by it that carried a current of electricity. It was the duty of the defendant to keep the highways along which it put its poles and wires substantially in the same condition as to convenience and safety as they were in before it constructed its lines along the streets.

Negligence has been said to be a failure of duty. Proof that there was a "live" wire (carrying a deadly current) down in the highway surely raised a presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant and was its property and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this "live" wire was in the street through no fault of its servants and agents.

In *Aycock* v. *Railroad,* 89 N. C., 321, where a plaintiff sought to recover damages for the burning of his property, fire having been communicated to it by sparks from an engine on the defendant's road, Chief Justice SMITH, discussing "the question as to the party upon whom rests the burden of proof of the presence or absence of negligence where only the injury is shown, in case of fire from emitted sparks," declares that this Court will "abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence"; and he adds that "the servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default show it and escape responsibility.'" This is affirmed in *Moore* v. *Parker*, 91 N. C., 275, where it is said that a *prima facie* case of negligence being thus made out against the defendant, he must produce proof of care on his part, or of some extraordinary accident that rendered care useless, in order to rebut the presumption.

Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant: "The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility."

Numerous authorities might be cited to sustain our conclusion upon this point, the cases being strictly analogous to this one. But we content ourselves with a reference to Ray on Negligence of Imposed Duties, page 145; Wood's R. R. Law, 1079; Witaker's Smith on Negligence, 423. The last mentioned author says (p. 422): "If the accident is connected with the defendant, the question whether the phrase '*res ipsa loquitur*' applies or not becomes a simple question of common sense." It seems to us that there is nothing in the relation of the deceased to the defendant or in any of the circumstances attending the incident of his death to prevent the rigid application here of the rule announced by Judge GASTON in *Ellis* v. *Railroad*, 2 Ired., 138, and re-affirmed, as stated above, in *Aycock* v. *Railroad*, *supra*.

Thus far, in the consideration of this matter, we have left out of view the contention of the defendant that the plaintiff's own evidence disclosed the fact that his intestate was guilty of contributory negligence, or at any rate that the facts so established, taken in connection with other facts which defendant's witnesses testified to, if found by the jury, convicted him of contributory negligence; and we have also kept out of view the contention of the plaintiff that there was no evidence of contributory negligence on the part of the deceased. His Honor was asked so to tell the jury, and he refused so to instruct them.

In this State, by statute, the burden of showing contributory negligence in this action is thrown on the defendant. What is negligence is a question of law to be declared by the Court. *Emry* v. *Railroad*, 109 N. C., 589, and cases cited. It was incumbent on the defendant, therefore, to show facts, either admitted or proved by the plaintiff, or testified to by his own witnesses, and found by the jury, from which the Court would draw the legal inference that the deceased was negligent and direct the jury to render a verdict declaratory of this legal inference, they having first determined that all the disputed facts pertaining to this part of the controversy were established by a preponderance of the testimony.

After a careful examination of all the evidence adduced on the trial, and after a full consideration of the argument of the able counsel for the defendant, we are clearly of the opinion that there was no evidence of contributory negligence, and his Honor should so have told the jury.

A child is held to such care and prudence as is usual among children of his age and capacity. *Murray* v. *Railroad*, 93 N. C., 92. The defendant contends that the deceased was ten years of age, "a very healthy, intelligent, moral and industrious boy." Let us assume this to be true. As he returned to his home the morning of his death, passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk—not by mere permission or invitation, but because he as one of the public had an absolute right so to do.

The wire was on the sidewalk. Only one witness saw him when "he took hold of the wire and the wire threw him in the ditch." That witness testified that "he did not have to reach for it; he just reached out his hand and took it; he did not have to stoop." No witness testified that there was anything from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or indeed any current at all. True, the witness who saw him grasp the wire, when he came to his rescue, saw the fiery indications of the passing of the current from the wire to his hand, and several witnesses deposed that after the accident and the throwing of the wire into a yard where there was wet grass they noted that the wire was "steaming" at the point where one of its coils touched the sidewalk, and also at its extemity in the yard. Grant this to be true, and yet there is not, as it seems to us, any evidence that it was "steaming" when the deceased caught the wire, or, if it was, that its "steaming" was such as to carry to a boy passing along a warning that he must not touch it. We should be very loth to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be jùdged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that "upon the evidence the plaintiff's intestate was not guilty of contributory negligence" should have been given.

It follows, from what has been said, that as the case was presented at the trial his Honor should have told the jury to answer the second issue No, and should have told them to answer the first issue Yes, if they believed the plaintiff's evidence, unless the *prima facie* case of negligence made out against the defendant was rebutted. It is said in *Moore*

v. *Parker*, *supra*, that proof of care on the part of the defendant, or of some extraordinary accident which renders care useless, is required to rebut the presumption. Inasmuch as there must be a new trial for the error above stated, it may be well to declare what degree of care is required of the defendant.

It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm and sometimes death to those who are compelled to use that means of conveyance. "As the result of the least negligence may be of so fatal a nature the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents." Ray on Neg., *supra*, p. 53.

All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam, apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated, and it can as readily prevent the possibility under ordinary circumstances of the contact of wires that should not be allowed to touch one another. There was error in allowing the defendant to prove that there was published in one of the city newspapers "a general statement" by an electric street-railway company to the effect that its current was not a deadly one—was not fatal to human life. That fact could not excuse the defendant. If it acted upon such a statement, and without further inquiry or examination conducted itself in the insulation of the wires as if the statement was true, that was to be negligent, for in such an affair to be mistaken and in error is to be careless. The fact that such a publication was made was irrelevant to the issues in the cause. What has been said seems sufficient to guide the next trial of the case. New Trial.

S. J. JARRELL v. JOHN DANIEL.

Landlord and Tenant—Lien on Crop—Division of Crop—Release of Lien.

1. A release of a landlord's lien on a crop can only arise upon an absolute and unqualified division to the tenant of his share; therefore,
2. Where a landlord and his tenant through a common agent designated and set apart the share of the crop which the tenant was to have whenever the advancements were paid on it, and the tenant was told not to remove such share until the lien was paid off, there was no such division as to divest the lien of the landlord.

This was a CIVIL ACTION for claim and delivery, tried before *Brown, J.*, and a jury, on an appeal from a Justice of the Peace, at July Term, 1893, of GRANVILLE Superior Court.

S. J. Jarrell, the plaintiff, introduced as a witness in his own behalf, testified that he rented a tract of land from

Mrs. Gooch for the year 1892; that he sublet it to the defendant, who was to pay one-half the crops. Plaintiff was to furnish the seed wheat and oats and other seed, a horse and feed for him, and one hand to help plant and cut tobacco. Defendant was to furnish all the labor. All crops were to be divided equally. Defendant had more crop than he could cultivate and failed to procure other help. Plaintiff had to furnish him additional hands, more than he agreed to furnish, and also made him advances to help make the crop. The balance due plaintiff on said account after allowing all credits is $40.26.

The tobacco was cured and stored in a barn on the premises, and plaintiff employed one Wheeler to strip the same. The plaintiff then proposed to prove that he told Wheeler, the defendant not being present, that defendant objected to Wheeler stripping his part of the tobacco upon the ground that he had a family and could strip it himself, and that plaintiff told Wheeler, the defendant not being present, before any agreement of division was had, that, in order to save the defendant the cost of Wheeler's stripping, he might set apart defendant's share of tobacco and strip the plaintiff's share.

Defendant objected. The objection was sustained, and plaintiff excepted.

"We agreed that Wheeler should divide the tobacco between us. The fodder had already been divided. The defendant's part of the tobacco was left in the pack-house, where my tobacco was. I wrote a note to defendant after the crop was divided, forbidding him to move his part of the tobacco. I don't know whether he got the note. We agreed before Wheeler to divide, and before the division I told the defendant he should not move anything until the debt and advancement had been paid. This was some time before we agreed upon Wheeler to divide the crop for us."

(It was admitted by both parties that afterwards Wheeler was appointed agent for plaintiff and defendant and divided the crop, and for the purpose of dividing it was their joint agent).

"It was in October or November, 1892, and I told Wheeler to go ahead and divide the tobacco between Daniel and myself and to strip my part. The tobacco was then in the pack-house on Mrs. Gooch's farm. The defendant's part of the tobacco remained in the pack-house. I left it there until I got out claim and delivery proceedings in April, 1893. I took my part of the tobacco off and sold it. On January 1, 1893, Mrs. Gooch took possession of the farm. I did not re-rent for 1893. When I gave up possession of the place the defendant's part of the tobacco was in the pack-house on the land. The crop was divided about Christmas, 1892."

His Honor then charged the jury that upon plaintiff's testimony there had been a division of the crop; that plaintiff's lien as landlord was destroyed, and that plaintiff was not entitled to recover, and they must find the issue in favor of the defendant. Plaintiff excepted.

There was verdict and judgment for the defendant, and plaintiff appealed.

Mr. J. W. Graham, for plaintiff (appellant).
Messrs. Batchelor & Devereux, for defendant.

CLARK, J.: The plaintiff, having sublet to the defendant, became lessor to his sublessee and entitled to the same lien on his crop which the statute gives to a lessor. *Moore* v. *Faison,* 97 N. C., 322. Had there been an absolute division of the crop as in *Jordan* v. *Bryan,* 103 N. C., 59, the plaintiff would have lost his lien. Such was not the case here. The plaintiff, it is true, took the part of the crop to which he was unquestionably entitled; but as to the balance he did not relinquish his lien. He and the defendant, by means of a common agent, designated and set apart the share the defendant was to have whenever the advancements were paid on it. This was done that the defendant might strip that share of the tobacco by himself and family so as to save expense. The true nature of the transaction was that it was not an absolute division by which a release of the landlord's lien was intended, but it was merely a designation and setting apart of so much of the crop for the preparation of it for market, with the executory agreement that it should belong to the defendant whenever the landlord's lien for advancements was paid. The uncontradicted evidence is that the defendant was told not to remove such share till the lien was paid off. If so, it was error to instruct the jury that such designation and setting apart with the express retention of the lien destroyed the lien. A release of the lien could only arise upon an absolute and unqualified division to the tenant of his share. The rights of the parties were not affected by the fact that the year having expired such part of the crop remained in the barn of the original lessor, the land-owner.

New Trial.

J. D. & R. S. CHRISTIAN v. J. P. PARROTT et al.

Note Under Seal—Negotiable Instrument—Transfer before Maturity for Value—Defences.

1. A bond negotiable in form and indorsed for value and without notice before maturity is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal.
2. The obligor in such a bond cannot set up the defence that prior to its transfer the payee agreed to release him from liability thereon.

This was an APPEAL from a Justice of the Peace, tried before *Brown, J.*, and a jury, at July Term, 1893, of GRANVILLE Superior Court.

The plaintiffs sued on the following bond:

"$225. On November 1, 1892, we or either of us promise to pay to R. H. McGuire or order the sum of two hundred and twenty-five dollars, with interest after maturity at eight per cent. per annum. Value received. Witness our hands and seals this 21st day of May, 1892.

"J. P. PARROTT, [Seal].
"S. A. FLEMING, [Seal]."

Upon which bond were these indorsements: "Pay to order of J. D. & R. S. Christian," "August 16, 1892"; "R. H. McGuire," "February 20, 1893, by cash on the within bond, forty dollars ($40)."

The defendants admitted the execution of the bond, and also the assignment and indorsements thereon.

S. A. Fleming, one of the defendants, testified: "About two weeks, not over three weeks, after I gave the bond to R. H. McGuire I had a conversation with him. He said he had been thinking about my signing this note, sued on, for Parrott as surety for Parrott; that it was more of a favor than he ought to wish or ask of me to assume the responsibility of this debt; and that if I would make Jim and Will Parrott come down and give him a mortgage that he would make them pay it and would relieve me of the trouble of collecting the note and collect it himself. I sent the Parrott boys down and they executed a mortgage upon their crop." (Defendants then introduced mortgage from J. P. and W. P. Parrott to R. H. McGuire on their crop, dated July 8, 1892). "I signed the note sued on in pursuance of an agreement between R. H. McGuire, J. P.

Parrott and myself that Parrott was to give me a mortgage on the crop to indemnify me for signing the note. This was crop of 1892, upon which the Parrotts gave McGuire the mortgage securing the debt. When I went home I told Parrott what McGuire had said. At time note was executed McGuire asked me if I would sign the note if the Parrott boys would give me a mortgage on the crop. I agreed to this."

Upon re-examination of defendant Fleming he states that, in the conversation with McGuire above referred to, McGuire said, "If you will get the Parrott boys to give a mortgage on the crop and make it to me I will release you from the note," and that witnesss Fleming did so; all of which happened after the date of the note and prior to August 16, 1892.

R. H. McGuire, witness for defendants, testified: "The note sued on was executed to me by the defendants. I did not agree to release Fleming from liability on the note; I did agree to relieve him of the trouble of collecting it if the Parrott boys would execute the mortgage to me. I assigned and indorsed the bond for value to the plaintiffs August 16, 1892. The plaintiffs had no notice of what had taken place between defendant Fleming and me. I did not give Fleming any notice of the assignment of the bond to the plaintiffs. I was indebted to the plaintiffs, and transferred this bond to them on account thereof. I am still indebted to the plaintiffs."

The issues submitted by his Honor to the jury and the responses were as follows:

"Are the defendants indebted to the plaintiffs as alleged, and if so, in what sum? Answer, $197, with eight per cent. interest on $190 from July 24, 1893.

"Was the note sued on indorsed for value to the plaintiffs by the payee before due? Answer, Yes, on August 16, 1892.

"Did the payee, McGuire, after the execution of note and prior to said transfer of said note to plaintiffs, agree to release defendant Fleming as alleged by Fleming? Answer, Yes.

"Did plaintiffs have notice of such agreement? Answer, No."

His Honor then charged the jury that if they believed the evidence the plaintiffs were entitled to recover. The defendant Fleming excepted, and insisted that the bond sued on was not a negotiable instrument, and that plaintiffs took it with all the equities existing between McGuire and defendant Fleming at time of indorsement and transfer. Defendant further insisted that the transaction testified to occurred after the execution of the bond and prior to the assignment and indorsement, and that although the bond was indorsed for value and before maturity, yet the plaintiff, the endorsee, took it subject to all equities arising between the execution of the bond and the date of the indorsement, whether plaintiff knew them or not. The jury, by instruction of the Court, found the issues as set out. There was judgment for the plaintiffs, and defendants appealed.

Messrs. Batchelor & Devereux, for plaintiffs.

Mr. A. W. Graham, for defendants (appellants).

SHEPHERD, C. J.: We have examined the authorities cited by the defendants' counsel and are unable to see anything in them which is sufficient to induce us to overrule the well-established principles of this Court as applicable to the case presented in the record.

The bond sued upon is in form negotiable, and was indorsed for value and without notice to the plaintiff before maturity. Such a bond when *indorsed* "is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal." *Miller* v. *Tharell*, 75 N. C., 148; *Spence* v. *Tapscott*, 93 N. C., 246. The principle was applied in *Lewis* v. *Long*, 102 N. C., 206, in which it was decided that an obligor on a bond of this character could not, as against an indorsee for value, before maturity and without notice, set up the defence that he executed the same as a surety only.

In the above cases the subject is fully discussed, and the conclusion reached is that such bonds when so indorsed have all of the immunities peculiar to commercial paper. It is proper to say that the counsel for the appellants did not very seriously insist in this Court that the ruling of his Honor, excluding the defences set up by the defendants, was erroneous. Affirmed.

REBECCA HARRISON, Administratrix of Robert Harrison, v. NANCY HARRISON et al.

Amendment of Record, when allowed.

While Courts have an inherent power to correct their records so as to make them speak the truth, this principle does not apply when the order sought to be amended has been construed and affirmed by this Court and contains the exact language of the Judge by whom it was dictated and signed, the ground upon which amendment is sought being that the language used by the Judge and the construction put upon it by this Court did not convey the true meaning of such Judge.

MOTION by Rebecca Harrison, Judith Harrison and Nancy Dement (formerly Harrison) to amend the record in a special proceeding by so altering the judgment signed by *Graves, J.*, at July Term, 1889, of GRANVILLE Superior Court in such proceeding (being the case reported in 106 N. C., 282, and in 109 N. C., 346) as to make the same what the movers claim Judge Graves intended it to be.

The motion was as follows:

"We move the Court to amend the judgment rendered by Judge Graves in the above entitled case, reported in 106th volume North Carolina Reports at page , so that said judgment shall express the judgment of the Court, so that the latter clause of said judgment shall read as follows: 'And all the orders heretofore made in said action shall be allowed to remain upon the record for the purpose of protecting purchasers and others so far as in law they afford protection as to the interest of George Harrison, and for the purpose of allowing the purchasers having refunded to them the purchase-money paid for the land; but as against the parties to this proceeding, except George Harrison, to-wit, Rebecca and Judith Harrison and Nancy Dement, the said judgment shall be absolutely void.'"

The movers put in evidence the certified copy of a part of the record from the Supreme Court to show that Mrs. Mary L. Hargrove, as executrix and sole devisee of T. L. Hargrove, was made party to the motion to set aside the order of sale. They also offered in evidence the deposition of the Hon. Jesse F. Graves, the pertinent parts of which were as follows:

"This was a motion made before the Clerk of the Superior Court of Granville County to declare void and to vacate and set aside an order of sale in the special proceeding made on the 3d of December, 1870, and to set aside the sale made thereunder as to Rebecca Harrison, Judith Harrison, Nancy Dement (formerly Nancy Harrison) and Mary Harrison, T. L. Hargrove and D. A. Hunt, purchasers at the sale under said order, who appeared by counsel and resisted the motion to set aside. On the trial before me all the proceedings were read and all the proofs offered, including the affidavits of T. L. Hargrove and D. A. Hunt, were heard and considered, and the whole motion was fully debated by counsel on both sides of the controversy. After hearing the whole matter, considering all the proofs and arguments of counsel, I found the facts as set out in the record of the Superior Court, and as set out in the statement of the case on appeal sent up to the Supreme Court. The bearing of these facts on the questions of laches, long delay, estoppel and acquiescence was fully considered. After these questions had been fully argued by counsel, I signed the judgment set out in the record, as follows:

"'Thereupon it is considered and adjudged by the Court that the said order of sale made on the 3d of December, 1870, was irregular and not according to the course of the Court as to the persons named as defendants, to-wit, Rebecca Harrison, Judith Harrison, Nancy Dement (formerly Nancy Harrison) and Mary Harrison, and is void as to them, and that the same be annulled and vacated as to them by this order, and that all the orders heretofore made in this action shall be allowed to remain upon the record for the purpose of protecting purchasers and others so far as in law they afford protection.'

"After considering all the matters alleged in the defence I rendered this judgment, and I intended thereby to finally declare that the proceeding in the Probate Court for the sale, and the sale made thereunder on the 5th of December, 1870, was irregular and not according to the course of the Court, and was void for any purpose as to Rebecca Harrison, Judith Harrison, Nancy Dement (formerly Nancy Harrison) and Mary Harrison, for the reason that these parties had never been served with any process and have not appeared in person or by attorney. George Harrison had been notified by publication, and I did not declare or intend to declare the proceedings void as to him, and the Court was not asked to do so.

"It appeared that Hunt and Hargrove had paid the purchase-money, and I supposed they might be entitled to have their money refunded. It also appeared that Robert Harrison, from whom the land came, had made a will by which it occurred to me, in certain contingencies, the purchaser of the interest of George Harrison might become entitled to a greater estate than one share. Now, in order to save the purchasers whatever right they may have had to have the money they had paid refunded, and in order to save to them all their rights under the purchase of the interest or share of George Harrison, I added to the judgment, which I signed, of my own motion, as I believe, these words: 'And that all the orders heretofore made in this action shall be allowed to remain upon the record for the purpose of protecting purchasers so far as in law they may afford protection.' I did not intend to leave open any questions as to the defendants, Rebecca Harrison, Judith Harrison, Nancy Dement (formerly Nancy Harrison) and Mary Harrison, but I intended to adjudge that the order of sale and subsequent sale was void, and did not pass any title to the alleged purchasers, as to them or their interests. I intended to have had the judgment entered, and to have made it a final adjudication between the parties then in Court, including the alleged purchasers, Hargrove and Hunt. It is probable I dictated the judgment to the Clerk, and did approve and sign it, believing I had declared finally the order of sale and the sale made thereunder was void, except as to George Harrison's interest. If the judgment as rendered fails to accomplish the purpose above indicated it arises from inadvertence or mistake on my part."

His Honor Judge Brown found the facts to be true as stated in the deposition of Judge Graves, but denied the motion to amend upon the ground that he had not the power to amend to the extent claimed, and also because the Supreme Court had affirmed the order and, in effect, declared it to be such as should have been made. From this refusal the movers appealed.

Messrs. Batchelor & Devereux, for plaintiffs (appellants).
Messrs. J. W. Graham and *E. C. Smith*, for defendants.

PER CURIAM: We listened with great interest to the argument of our able and learned brother in behalf of the appellants and have examined with much care the numerous authorities to which he referred. None of them, we think, go to the extent claimed by him. It is admitted that the order which is sought to be amended is precisely as the Judge dictated it, and this order has been construed by the decision of this Court. 109 N. C., 346. It is now insisted that this construction is not what the Judge intended, and we are asked to practically reverse our decision by allowing the order to be amended so as to convey the real intention of the Judge in making it. Undoubtedly the Courts have an inherent power to correct their records so as to make them speak the truth, but this principle does not apply here, as the record contains the exact language of the Judge, and the only objection urged is that we have construed it erroneously, or that he did not express it in such a way as to convey his true meaning. It must be manifest that if such an amendment can be allowed there will never be an end to litigation. We think the ruling of his Honor should be Affirmed.

THE TIMES COMPANY v. THE NORTH CAROLINA STEEL AND IRON COMPANY.

Written Contract, construction of—Meaning of "From Date"—Market Value.

1. Where the general manager of an industrial company, in order to induce a publishing company to take pay for an advertisement in the paid-up stock of the former, guaranteed that the stock would be worth par "within a year from date": *Held*, that the period covered by the guaranty was a year from the date of the contract, and not from the date of completion of the advertisement and issuance of the stock.
2. In the trial of an action for a breach of a guaranty that a certain stock would be worth par within a year from date of the contract, evidence of the market value of such stock after the lapse of the year was properly excluded.

CIVIL ACTION, tried at August Term, 1893, of GUILFORD Superior Court, before *Brown, J.*, and a jury.

The action was brought by The Times Publishing Company, of Richmond, Va., to recover of the defendant company upon an alleged contract as follows:

"MAY 22, 1890.

"J. A. SMITH, ESQ.,
"*The Times*, Richmond, Va.,

"DEAR SIR:—You are hereby authorized to place ($1,000) one thousand dollars worth of advertising for our company in *The Times* and display to best advantage. The advertisement to appear on the 29th in your large unveiling edition, and to be continued to the best advantage, including editorial and local letters from this point. Payment to be made in fully paid-up stock of our company, and the stock is hereby guaranteed to be worth par inside of one year from date. Judging from what we have in iron-making and what is to be done in steel-making, we can declare 25 per cent. dividend on the stock annually. From the proceeds of the sale of town lots a further dividend will accrue to the stock.

"Yours truly,
"(Signed) J. J. NEWMAN,
"*General Manager.*"

The plaintiff introduced testimony tending to support its contentions as alleged in the complaint; specially that the stock was not worth par during the time covered by contract, to-wit, from one year from date of contract and one year after stock issued.

The defendant introduced testimony tending to support its contentions as alleged in its answers.

Among the plaintiff's witnesses was one Cartland, who testified "that as to the market value of the stock from May 22, 1890, to May 21, 1891, I am not acquainted; don't know what it was worth in May, 1891; it may have been worth par in May, 1891, so far as I know."

Plaintiff then proposes to prove by said witness Cartland that the stock of defendant has no market value now and has not had for the past eighteen months; this was offered as substantive evidence and corroborative of evidence of other witnesses as to the value of the stock inside of twelve months, which, upon objection by defendant, was excluded by his Honor, and plaintiff excepted.

His Honor then submitted the following issues to the jury without objection:

"1. Was the stock of the defendant company admitted to have been delivered to plaintiff on April 18, 1891, worth par at that date?

"2. Was the stock of defendant worth par inside of one year from date of the alleged contract, to-wit, May 22, 1890?

"3. Is the defendant indebted to the plaintiff, and if so, what amount is plaintiff entitled to recover?"

The plaintiff contended that the proper construction of the contract was that the words "inside of one year from date" meant one year from date of delivery of the stock, and in his instructions to the jury his Honor held that the proper construction was one year from the date of the contract, to-wit, May 22, 1890, to which plaintiff excepted.

His Honor instructed the jury that if they answered the first issue in the affirmative they need not answer the other issues, to which there was no exception.

The jury found the first issue in the affirmative and did not pass on the other issues. There was judgment for the defendant, and plaintiff appealed, assigning for error the exclusion of the testimony and the ruling of his Honor as to the construction of the contract, as excepted to above.

Messrs. Dillard & King and *L. M. Scott* (by brief), for plaintiff (appellant).

Mr. R. T. Gray, for defendant.

Burwell, J.: The construction put upon the letter of the manager of defendant company seems to us to be the proper one. It construes the words of the writer most strongly against him. He was endeavoring to induce the plaintiff to enter into a certain contract upon the representation and guaranty that the stock of his company would be worth par within a year "from date." The danger of becoming liable on this guaranty was greater if the date of the letter was meant than it would be if the date of the completion of the work and the issuing of the stock was intended as the limit of time from which to complete the period during which the guaranteed fact would occur. Such must have been, we think, the understanding of the parties, and subsequent events cannot change their contract. His Honor properly excluded evidence as to the market value of the stock after the lapse of the period fixed in the letter—twelve months from its date. To have allowed such evidence to be introduced would have opened perhaps a wide field of investigation and discussion in regard to the causes of the decline in value, and could not possibly have aided the jury in determining the issues submitted to them.

No Error.

AUGUSTUS MAGGETT v. E. E. ROBERTS,

Practice—Case on Appeal, absence of—Affirmation of Judgment.

Where no case on appeal accompanies the record and no error is apparent on the face of the latter, the judgment below will be affirmed.

APPEAL by defendant from judgment in favor of plaintiff, rendered in an action tried before *Whitaker*, *J.*, at December Special Term, 1893, of NORTHAMPTON Superior Court.

No case on appeal accompanies the record.

Mr. R. B. Peebles, for plaintiff.

No counsel *contra.*

PER CURIAM: Because there is in the record no case on appeal and no error appears on the record proper, the judgment is

Affirmed.

W. A. BARBER v. W. H. BUFFALOE.

PETITION of defendant to rehear case reported in 111 N. C., 206.

Mr. R. O. Burton, for plaintiff.
Mr. R. B. Peebles, for defendant (petitioner).

PER CURIAM: After a careful consideration of the argument of counsel we are of the opinion that there is no ground for reversing our former ruling.

Petition Dismissed.

MACRAE, J., dissents.

A. W. GRAHAM v. L. C. EDWARDS.

Practice — Docketing Appeal — Dismissal — Motion to Re-instate — Verbal Agreement of Counsel — Failure of Clerk to send up Record—Certiorari.

1. An appeal not docketed before the close of the call of the District to which it belonged at the Term of this Court next succeeding the trial or (upon failure of appellee to move to dismiss under Rule 17) during the Term will be dismissed, on motion, if docketed at the Term following that at which it should have been docketed.
2. An alleged verbal agreement between counsel that an appeal not docketed at the proper time should go over to the next Term will not be considered if denied by the appellee. (Reiterated suggestions of the Court as to the necessity and propriety of having all agreements between counsel reduced to writing or noted in the minutes of the Court).

3. Where the Clerk of the Court below delays to send transcript of record in time to docket the appeal a *certiorari* should be applied for by the appellant at the Term next succeeding the trial below, but after the expiration of such Term a *certiorari* will not issue.

PETITION of plaintiff to re-instate appeal dismissed at September Term, 1893, for that the same was not brought to the proper Term of this Court.

Messrs. J. W. Graham and *T. T. Hicks*, for petitioner.
Messrs. Batchelor & Devereux, contra.

CLARK, J.: This action was tried at November Term, 1892, of the Court below, and should have been docketed here before the close of the call of the District to which it belonged at Spring Term, 1893. Though, as the appellee did not move to dismiss under Rule 17, the appeal could have been docketed at any time during that term. *Porter* v. *Railroad,* 106 N. C., 478. The appeal was not docketed till Fall Term, 1893, and was then, on motion of appellee, dismissed. This is a motion to re-instate the appeal made at Fall Term and continued over to this. It is based on two grounds:

1. That the counsel for the appellee agreed that the docketing of the appeal might go over till the Fall Term. The alleged agreement was not in writing and is denied by appellee's counsel. It cannot, therefore, be considered. Rule 39 of this Court and numerous cases cited in Clark's Code, second edition, 704. This Court is for the correction of errors of law committed in the trial of causes below. We cannot be called upon to settle disputed matters of fact arising upon oral agreements of counsel. *Hemphill* v. *Morrison*, 112 N. C., 756. The duty of passing upon the correctness of memory of counsel as to such agreements when there is a difference is a delicate one. It is not contemplated by the

statute that we should be called upon to discharge such function, and we have no right or disposition to assume it. We again repeat, as was lately said in *Sondley* v. *Asheville*, 112 N. C., 694: "It is to be hoped that hereafter counsel will in every instance put their agreements in writing or have them entered of record, when for any reason they may think best to depart from the plain provisions of the statute. If they do not care to do this the Courts will not pass upon the controversies as to the terms or existence of such agreements." Our brethren of the bar owe it to themselves and to the Court to avoid bringing such controversies hereafter before the Courts. Their experience as lawyers must impress upon them the treachery of memory among the very best of men. If not disposed to guard against differences of recollection by the easy mode of reducing agreements to writing or having them entered on the minutes, the Courts have no process to gauge the accuracy of their respective recollections.

2. The second ground is that the Clerk of the Superior Court was dilatory in sending up the transcript. Without adverting to the affidavit of the Clerk and his deputy denying any laches on their part, it is sufficient to say that if by fault of the Clerk the transcript was not sent up the appellants should have filed their application for a *certiorari* at Spring Term, 1893, being the first term after the trial below. As they failed to do so they were not entitled either to docket the appeal or to a *certiorari* after that term. *Pittman* v. *Kimberly*, 92 N. C., 562; *Suiter* v. *Brittle*, *Ibid.*, 53; *State* v. *James*, 108 N. C., 792; *Pipkin* v. *Green*, 112 N. C., 355.

Motion denied.

W. L. MYERS v. WILLIAM STAFFORD et al.

Practice—Excessive Damages—Motion to Set Aside Verdict—Argument of Counsel.

1. Notwithstanding the statute (sec. 412 (4) of *The Code*) requires a motion to set aside a verdict on the ground of excessive damages assessed thereby to be heard at the same term of Court at which the trial is had, yet, by agreement of counsel, a motion made at the trial term may be heard and determined by the same Judge at a subsequent time.
2. The fact that an appeal was perfected pending a motion to set aside a verdict, the hearing of which had been postponed by consent to a subsequent term of Court, did not debar the Judge below from hearing and determining such motion at the time appointed.

This is an APPEAL from an order made at December Term, 1893, of GUILFORD Superior Court, by *Brown, J.*, setting aside verdict rendered at the previous August Term.

The motion to set aside the verdict was made by the defendants upon the ground that the damages were excessive and was based upon an agreement in writing between counsel for both parties entered upon the record of the Court at August Term, 1893. Said agreement is set out in the order made by the Court at December Term, 1893, a copy of which will be sent up by the Clerk.

The plaintiff objected to the Court considering and entertaining said motion upon the grounds:

1. That a judgment had been signed at August Term, and

2. That the cause was pending in the Supreme Court on appeal.

The Court, being of opinion that the agreement of record entered into between counsel in open court at August Term was binding and paramount; that the judgment was inconsistent with it; that the appeal was premature, and that the cause was still pending by virtue of said agreement in the Superior Court of Guilford County for the purpose of said motion, decided to entertain and consider said motion to set aside the verdict and judgment. The plaintiff duly excepted.

After hearing and considering the motion the presiding Judge at December Term, 1893, being the same who tried the cause at August Term, 1893, being of opinion that the damages were excessive, set aside the verdict and judgment and awarded a new trial in accordance with the order filed at said December Term, 1893.

Plaintiff excepted and appealed.

The following is a copy of the agreement above referred to:

"It is consented in this cause that at December Term of Superior Court, 1893, this county, the defendant may move to set aside the finding and verdict upon second issue, as to damages, before G. H. Brown, Jr., Judge, and that at that term said Judge may or may not, in his discretion, set aside the verdict as to damages only, after hearing argument.

"Agreed to in open court September 8, 1893.

"G. H. BROWN, JR.,
"*Judge.*"

Mr. J. A. Barringer, for plaintiff (appellant).

Messrs. James. E. Boyd and *J. A. Long*, for defendants.

MACRAE, J.: While the statute, section 412 of *The Code* (4), provides that motions to set aside verdicts upon the ground of excessive damages can only be heard at the same term at which the trial is had, it has never before been seriously questioned that counsel might agree that said motion be heard and determined at a subsequent time. This course, with regard to many matters required to be done in term, is daily taken in the practice; indeed it frequently occurs that on account of the press of business before the Court, the length of the term being limited, it is impracticable for the Judge or the counsel to give the necessary attention to motions of this kind which their importance demands. While the sections of *The Code* are equally imperative with regard to the time for perfecting appeals, as a matter of fact the time is generally regulated by agreement of counsel. In this case the judgment was rendered at August Term, 1893, and appeal noted, notice waived and bond fixed upon the record. And then was entered the agreement of counsel as set out above, that the same Judge who tried the case might hear a motion to set aside the finding and verdict upon the second issue at the next term. And at the next term his Honor, upon consideration, did set aside the verdict upon the second issue upon the ground that in his opinion the damages assessed were excessive.

It will appear by the record that after the adjournment of the August Term, and while the agreement was pending, the defendant's counsel served a case on appeal upon counsel for plaintiff, which case was accepted by said counsel, and the transcript was sent up to this Court by the Clerk. At December Term, when the motion to set aside was made and heard according to agreement of record, plaintiff objected that the case was now in the Supreme Court.

It can readily be seen that the appeal was perfected out of abundant caution, but that it was prematurely sent up to this Court, pending the motion to set aside, the time for the hearing of which motion had been extended by consent. The setting aside of the verdict was a matter of discretion. *Hicks* v. *Gooch*, 93 N. C., 112; *Hilliard* v. *Oram*, 106 N. C., 467.

Affirmed.

W. L. MYERS v. WILLIAM STAFFORD et als.

Action for Damages—Bastardy Proceedings—Begetting Bastard Child a Misdemeanor—Work on Public Roads.

1. The begetting of a bastard child, which formerly rendered the defendant amenable only in the civil proceeding, has, by the Act of 1879 (section 35 of *The Code*), become a petty misdemeanor, and the defendant may, under the authority of section 3448 of *The Code*, be put to work on the public roads until the fine and costs are paid.
2. County Commissioners who ordered a defendant in bastardy proceedings who had been committed to jail in default of payment of the allowance, fine and costs, to be put at work on the public roads of the county are not liable therefor in an action for damages by such defendant.

This was a CIVIL ACTION for damages, brought by the plaintiff against the members of the Board of Commissioners of Alamance County, tried before *Brown, J.*, and a jury, at August Term, 1893, of GUILFORD Superior Court.

The plaintiff was, in September, 1890, adjudged guilty in bastardy proceedings by a Justice of the Peace and ordered to pay a fine of ten dollars, the costs of the proceeding and the allowance to the mother of the child. In default of payment he was committed to jail, there to remain until legally discharged. The defendants, on the 6th of October, 1890, passed an order directing the Sheriff of the county to deliver the plaintiff to the superintendent of the county work-house to be worked on the public roads of the county until discharged by law, and the plaintiff was thereupon delivered to the said superintendent and kept in the work-house and worked on the public roads with the other prisoners until the 15th of October, 1890, when, upon a writ of *habeas corpus*, he was returned to the jail and remained until he was discharged.

Before the jury was impaneled the defendants demurred to the complaint *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that, upon his own admission, being in the common jail for the non-payment of costs and fees in a bastardy proceeding, the Board of Commissioners had the right to put him in the work-house to work out such costs, and, therefore, the transfer of plaintiff from the common jail to the county work-house was not unlawful.

Defendants' motion was overruled, to which defendants excepted.

The following issues were submitted:

"1. Did defendants unlawfully and wrongfully commit the plaintiff to the work-house of Alamance county and wrongfully detain him there and work him upon the public roads of said county, as alleged in the complaint?

"2. What damage has plaintiff sustained?"

At the close of the testimony defendants asked the Court to instruct the jury to find the first issue in the negative, which the Court refused, and directed the jury, as a matter of law, that the answer to the first issue should be Yes; and the jury so found. And in response to the second issue the jury assessed plaintiff's damages at four hundred dollars.

On the return of the verdict defendants moved for a new trial, which was refused, and from the judgment for plaintiff defendants appealed.

Meessrs. L. M. Scott, J. T. Morehead and *J. A. Barringer*, for plaintiff.

Messrs. J. A. Long and *J. E. Boyd*, for defendants (appellants).

MACRAE, J.: We have held in the plaintiff's appeal that this appeal was prematurely perfected, pending an agreement that a motion to set aside the judgment and the finding upon the second issue might be heard at December Term. His Honor at said term having heard the motion and set aside the judgment and the finding upon the second issue, the case now stands for trial in the Superior Court upon the said issue, and the exceptions taken upon the former trial, as to the first issue, having been saved and reserved would be heard by this Court should there be another appeal. But as the matter was fully argued here upon the question involved in the first issue, we deem it proper to express the opinion of the Court at this time in order to bring the litigation to a speedier close.

The question is whether the defendants had any power or authority in law to work upon the public roads, along with convicts, a person who had been committed to jail by a Justice of the Peace in default of payment of fine and costs in a bastardy proceeding. The plaintiff's counsel contend:

1. That there is no statute authorizing confinement with labor, except where parties have been convicted of crime.
2. That no person convicted of crime can be put to labor unless by *order* of the Court passing the sentence.
3. The plaintiff was convicted of no crime.
4. That there was no sentence to labor, and if there had been it would have been in violation of Art. 1, section 33 of the State Constitution, and of Art. 13, section 1 of the Federal Constitution.

The commitment is as follows:

"Whereas Walter L. Myers, the prisoner herewith sent you, has this day been convicted before me, an acting Justice of the Peace for Boon Station township in said county, on the charge of bastardy, and sentenced for a fine of ten dollars for State and to forty dollars for mother of child and four dollars and fifty-five cents costs—total, $64.55: You are therefore commanded to receive the said Walter L. Myers into the common jail of the county of Alamance, there to remain until the expiration of the time aforesaid, and that he shall remain in prison until the costs and fine are paid, or he shall otherwise be discharged according to law. H. F. TICKLE,

"*Justice of the Peace.*

"I suggest to the Board of County Commissioners to put said Myers on public roads of said county until said fines and cost are paid."

Thereupon plaintiff was turned over to the manager of the work-house by the County Commissioners and worked upon the county roads.

The contention of defendants was that it was their duty to put the plaintiff to work on the roads in order to indemnify the county against loss for jail fees, etc. Under the provisions of chapter 355 of the Acts of 1887, as amended by chapter 419 of the Acts of 1889, the only provisions of these acts which could in any view apply to this case are those contained in section 1 of the Act of 1887 and the amendment thereof in that of 1889: "That when any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon public roads, it shall be lawful for and the duty of the Judge holding court in such counties to sentence to imprisonment and hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jails or in the State prison the following classes of convicts: First, all persons convicted of offences the punishment whereof would otherwise wholly or in part be imprisonment in the Penitentiary for a term not exceeding ten years."

"In such counties there may also be worked on the public roads in like manner all persons sentenced to imprisonment in jail by any magistrate, and also all insolvents who shall be imprisoned by any Court in said counties for nonpayment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they shall have repaid the county to the extent of half fees charged up against the county for each person taking the insolvent oath." (The balance of the section is not material to our present inquiry).

The first paragraph quoted above is the Act of 1887, and refers exclusively to persons sentenced by the *Judge* holding the courts of the county. The second paragraph is the amendment of 1889, and the only part thereof which by any construction could be made applicable to our present case, is: "There may also be worked on the public roads in like manner all persons sentenced to imprisonment in jail by any magistrate." The defendant was sentenced to pay a fine and an allowance and costs, and was committed to jail until the fine and costs were paid.

Now, we are construing a penal statute; the sentence is to pay the fine and allowance and costs; the incident is that he shall be kept in prison until the fine, etc., are paid or until defendant is discharged according to law. In some cases there may be fine *and* imprisonment imposed as a punishment for crime. But to say the least it is very doubtful whether, under this section, the defendant may be put to work upon the public roads, especially before he has taken the insolvent's oath.

It is contended further that under section 38 of *The Code*, where it is provided that "when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall by law be subject to be committed to prison in default of paying the same, it shall be competent for the Court to sentence such putative father to the house of correction," etc. By section 4 of Art. 11 of the Constitution, "The General Assembly may provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanor shall be restrained and usefully employed." This section has never been executed by appropriate legislation. So there is no house of correction in which the defendant could be confined, and by no process can we conclude that labor on the public roads is equivalent to imprisonment in the house of correction.

But we find that section 3448 of *The Code* provides that "the Boards of Commissioners of the several counties within their respective jurisdictions, or such other county authority therein as may be established, * * * shall have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs, or to give good and sufficient security therefor, provided," etc. (The balance is not pertinent).

Was the plaintiff, then, imprisoned in the county jail of Alamance upon conviction of a misdemeanor, and did he fail to pay all the costs he was adjudged to pay? The issue of paternity usually submitted to the jury is substantially this: Is the defendant the father of the child? The answer is yes or no. Before the Act of 1879, which authorized the imposition of a fine and thereby distinguished the proceeding in North Carolina from that in any other State, as far as we have ascertained, it was a civil action, with some anomalous features, the object of which was to save harmless the county from the expense of caring for the bastard child; and although it was sometimes called a quasi-criminal action it was distinctly recognized as a civil proceeding in which provision was made for the enforcement of a police regulation. On the passage of the Act of 1879 its nature was changed in a very important particular, for upon the finding of the issue of paternity against defendant he was to be fined by the Judge or Justice not exceeding ten dollars in addition to the allowance to be made for the use of the woman, for the payment of which he was required to give bond, etc., and "in default of such payment he shall be committed to prison." Section 38 permitted the Court to sentence the putative father to the house of correction for such time not exceeding twelve months, etc., but as we have said this section is inoperative by reason that we have no house of correction, therefore the jurisdiction of the Justice of the Peace is not disturbed.

The effect of the Act of 1879 has been carefully considered by Justices AVERY and CLARK, in *State* v. *Burton*, 113 N. C., 655, where the former, speaking for himself, concludes that by force of the act requiring the imposition of a fine the nature of the action became criminal, and the latter expressed a different opinion. In their opinions the cases on the subject are fully cited. The question now being presented in such a shape that it is necessary to be decided, we are of the opinion that the begetting of a bastard child, which formerly rendered the defendant amenable only in the civil proceeding, has by reason of the Act of 1879, *The Code* §35, become a petty misdemeanor. It was demonstrated in *State* v. *Burton*, *supra*, that a fine can only be imposed by the Court for a crime or misdemeanor or a contempt. Having been adjudged the father of the bastard child, the Justice imposed a fine under the last statute and required him to pay the costs, etc., and committed him to jail in default. The defendant had been convicted of a misdemeanor, and by virtue of section 3448 might be put to work, not farmed out, until the fine and costs were paid or he was otherwise discharged according to law, and the defendants rightfully provided for his being so worked and cannot be held liable to him for such action. This action is not in conflict with the constitutional provisions as insisted by plaintiff, as we have held the defendant to have been found guilty of a misdemeanor; the right of trial by jury is not taken away; the provision that either party may appeal, as will be seen by reference to section 32 of *The Code*, applies to the affiant, the woman or the defendant, and so does not conflict with the general rule that the State may not appeal from a judgment upon a verdict of not guilty; and the provision that the examination of the woman shall be presumptive evidence of the truth of the charge is simply shifting the burden of proof as in the case of an indictment for an escape. In this view, while the appeal is to be dismissed as prematurely taken, we have thus indicated our opinion upon the merits in order that the plaintiff may be so advised.

Appeal Dismissed.

W. L. HOLT AND E. C. HOLT, Executors of Alexander Holt, v. T. M. HOLT et al., Trustees.

Will, construction of—Bequest in Trust, whether absolute or for life—Power of Cestui Que Trust to Dispose of Legacy by Will.

1. In the construction of a will the intent of the testator, as ascertained from the consideration of the whole will in the light of the surrounding circumstances, must govern.

2. In a disposition by will no words are necessary to enlarge an estate devised or bequeathed from one for life into one absolute or in fee, and, generally, restraining expressions are necessary to confine the gift to the life of the legatee or devisee.

3. A testator, after providing for his widow and making equal distribution of his property among all his children except A., a bachelor son, who, he seemed to fear, would dissipate his share, bequeathed to trustees thirty thousand dollars, "to be by them held in trust for my son A.; and this I intend as A.'s full share of my estate; and they shall from time to time use so much interest, as it accrues, for his decent support, but not for his excessive indulgence. Any balance of interest is to be invested." There was a residuary clause specifying several sources from which the residuum might be derived, but none embraced the remainder of the fund given to A. In the disposition of the life estates in other parts of the will the intention of the testator was clearly expressed: *Held*, that the trustees, after paying over so much of the interest as was necessary for A.'s decent support, held the balance for his benefit and subject to such disposition as he might make thereof by will, or, in case of his intestacy, to go to his distributees.

CIVIL ACTION, brought by the executors of Alexander Holt, deceased, against T. M. Holt and others, trustees under the will of Edwin M. Holt, deceased, and heard by consent at May Term, 1893, of ALAMANCE Superior Court, before *Bryan, J.*

There was judgment for the plaintiffs, and defendants appealed.

The facts appear in the opinion of Associate Justice MACRAE.

Messrs. J. W. and *P. C. Graham* and *E. S.* and *Junius Parker*, for plaintiffs.

Messrs. Haywood & Haywood and *Strong & Strong*, for defendants (appellants).

MACRAE, J.: The object of this action is to obtain a construction of item 13 of the will of E. M. Holt, deceased, as to the disposition to be made by the trustees named therein, the defendants in this action, of the fund bequeathed to them in trust—it being left in doubt whether the bequest in said item was intended to be limited to the beneficiary during his life or was simply restrained by a provision limiting his power of disposal thereof; the said beneficiary having by his last will treated the bequest to himself as an absolute one and in his turn disposed of the same, it was necessary for the protection of the trustees that the question should be submitted to the Court and it is properly presented in this proceeding.

"Item 13. I give and bequeath to the trustees hereinafter appointed the sum of thirty thousand dollars, to be by them held in trust for my son, Alexander Holt, and this I intend as Alexander's full share of my estate."

So far there can be no question of construction; the above language plainly gives an absolute equitable estate in the whole fund to the *cestui que trust.*

But there is added to the foregoing this further clause: "And they shall from time to time use so much of the interest, as it accrues, for his decent support, but not for his excessive indulgence. Any balance of interest is to be invested in good securities."

The question arises upon the last quoted portion of the said item whether it does not so qualify and limit the bequest as to give to the said Alexander only a right during his life to such part of the interest accruing upon the principal as might be set apart to him by the trustees "for his decent support."

The elementary principle regarding the construction of wills, for which it is no longer necessary to cite authorities or to give reasons, is that the intent of the testator is to govern and that this intent is to be ascertained from a consideration of the whole will, in the light of the surrounding circumstances. As by law a will like that we have before us must be *in writing*, it cannot permit parol evidence to be adduced, either to contradict, add to or explain the contents of such will. 1 Jarman on Wills, section 349; *Kinsey* v. *Rhem*, 2 Ired., 192.

"But though it is the will itself, and not the intention as elsewhere collected, which constitutes the real and only subject to be expounded, yet in performing this office a court of construction is not bound to shut its eyes to the state of facts under which the will was made. On the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator." 1 Jarman, section 363.

It will be observed that there are no admissions in the pleadings bearing upon the question, nor is there any testimony offered to aid us in our investigation. In this case we are strictly confined to the will, not the item itself to be construed, but to the whole will and to the circumstances of the case to be gathered from a careful reading of the will.

As no two cases are precisely alike we can derive but little aid from the application of recognized principles under other and different circumstances. The will was evidently drawn with great care, by a skilled hand, and under intelligent direction. We find no difficulty in reaching the conclusion that the great object of the testator, a man with large wealth and with a numerous family, was to make abundant provision for his widow during her life, and to provide for some of his grandchildren, and of the residue of his estate to make a just and equal distribution among all his children except Alexander, and *he* was to have a liberal provision in full of his share in the estate. It appears upon the face of the item under consideration that with regard to this son there was an apprehension in the mind of the testator that his share, if placed in his own hands, might be dissipated in excessive indulgence.

It was suggested on the argument as a reason why the intention of the testator was to give only a life estate in the fund, or such part of the interest upon it as the trustees might deem just and necessary for his support, to this son, that he was unmarried and that he had reached that period of life when it was not probable he would ever marry, and therefore that he could have no family to be cared for. However true this may be, we are not at liberty to give it consideration, because it does not appear by the will nor by the admissions of the pleadings, nor by any evidence to that effect.

In a disposition by will no words are necessary to enlarge an estate devised or bequeathed from one for life into one absolute or in fee. Indeed, it is generally necessary that restraining expressions should be used to confine the gift to the life of the legatee or devisee.

If there had been no residuary clause in this will, under the principle that one will not be presumed to die intestate as to any part of his property when by a reasonable construction of the will such presumption can be avoided, it would have been conclusive that the testator intended an absolute gift for the benefit of his son, Alexander, though limited as to his enjoyment thereof. *McMichael* v. *Hunt*, 83 N. C., 344. The provisions for the disposition of the residuum are found in items 20 and 21, and it will be found that the sources from which this residuum might be derived are referred to, as (1), all stocks and bonds not heretofore disposed of; (2), all property, both real and personal, not heretofore disposed of; (3), the proceeds of property in Charlotte and Lexington hereinbefore directed to be sold; (4), all the residue of my estate arising from the collection of debts (5) or otherwise.

None of these, unless it be the last, would embrace the remainder in the fund bequeathed to his son Alexander, and the care with which the will was drawn would prevent us from determining that the words "or otherwise" were intended to control the character of the bequest in item 13.

We find that in the other items of the will where life interests were devised or bequeathed the intention is plainly expressed and words of disposition equally explicit are used as to the remainders. See items 2, 3, 4 and 5. Instances of absolute gifts of personalty may be found in items 11 and 12 without any express words to show the extension of the bounty to the distributees or assigns of the beneficiaries.

The words "and their heirs" are used where real estate is the subject of disposition, as in item 9, and where it was desired to provide a right of survivorship among certain beneficiaries, as in item 10. And when the proceeds of sales of stocks and bonds were to be divided among his sons and daughters those shares given to married daughters were to be held by trustees for them and their heirs.

Items 13 and 17 are in their nature very similar, the evident object being to restrain the disposition by the beneficiaries in such manner as to do them injury rather than good; in neither of these items are there plain words restraining the gifts to the lives of the legatees; indeed in item 17 it appears that it was in the contemplation of the testator that in a certain event the legatees therein named should take an absolute estate freed from the interposition of trustees.

It was suggested on the argument by the learned counsel for the defendants that if the bequest was intended to have been an absolute one and not merely for the life of the beneficiary, his power of disposition was necessarily such that he might defeat the purpose of the testator by an assignment or transfer of his interest in the fund bequeathed to him, but it is plain to us that the trustees in item 13 held the legal title to the fund for the purpose of the administration of the trust, the payment of the interest to the *cestui que trust* according to his necessities and not for his excessive indulgence. The *cestui que trust* had no control over the fund, not even of the accumulation of interest over what may have been paid to him by the trustees; therefore he had no power nor equitable right to dispose of principal or of any part of the interest which was not paid over to him. And he could not defeat the object of the testator by any conveyance of his interest to take effect during his life-time. If there might have been such a conveyance, by deed or will, of the fund to take effect after his death as to have enabled him to partially defeat the object of the testator, the difficulties in the way of such conveyance made it a remote possibility.

A general rule of construction is that in a bequest of the interest, no express disposition having been made of the principal, it goes to the legatee of the interest, unless, indeed, it appears from the nature of the subject or the context of the will that the interest only was intended for the legatees. *McMichael* v. *Hunt*, *supra*.

Without doubt prior words in a will may be controlled and modified as to their meaning by subsequent expressions, and, as we have before said, the *intent* of the testator is to be reached from the whole will. If by the context it appeared that the intention of the testator was to give to his son Alexander a life interest only, there would be no difficulty in controlling the general words in the first clause of the item, the effect of which, without modification, would have been to have given an absolute title, but taking the will for our guide, and examining its every provision to enable us to reach the true intent of the testator, we are of the opinion that for satisfactory reasons he gave to his son Alexander, in full of his share in the estate, the sum of thirty thousand dollars, and that he placed this sum in the hands of trustees with power and discretion to pay over to his said son so much of the interest as was necessary for his decent support, and the balance to hold for his benefit and subject to such disposition as he might make thereof by will, or in case of his intestacy to go in course of distribution to his next of kin according to law. There is no error. Affirmed.

IN THE MATTER OF THE ADMINISTRATION ON ESTATE OF MARY TAPP, deceased.

Application for Letters of Administration—Issue—Disputed Title to Property.

A dispute as to the title to property alleged, in application for letters of administration, to belong to the decedent, is not such an issue of fact as is required by section 1382 of *The Code* to be transferred to the Superior Court for trial.

Richard L. Tapp, on the 27th March, 1893, applied before S. M. Gattis, Clerk of the Superior Court of Orange County for letters of administration on the estate of Mary Tapp, deceased, in which it was stated that the value of the estate was about $475, and that "the estate of the said deceased, if she had any at all, consists of a note on Daniel Thompson for $500 or $600, which the executor of William Tapp claims as a part of testator's estate, and suit against Thomas Tapp is now pending for its recovery, and that R. L. Tapp, J. T. W. Tapp and Catherine Thompson are entitled as heirs and distributees thereof."

Thereupon J. T. W. Tapp, objecting to the issuing of letters, etc., filed his complaint as follows:

"1. That Mary Tapp died April 1st, 1888, and hitherto no one has applied for letters of administration upon her estate; that she left surviving her husband, W. H. Tapp, who died February 9, 1892, and who, during his life-time, made no application for letters of administration, because Mary Tapp was indebted to no one.

"2. That said Mary Tapp owned and possessed a note of hand upon one Daniel F. Thompson, the only personal property she had, and during her life-time, and with the consent of her husband, she gave said bond to J. T. W. Tapp, who has had said bond in his possession and claimed the ownership thereof for more than three years, and the sole object of Richard L. Tapp in applying for letters of administration upon the estate of said Mary Tapp is to worry and annoy the said J. T. W. Tapp, and that said Richard has declared his intention and purpose to be to expend the entire estate unless he could carry his point, as complainant is informed and believes.

"Wherefore complainant denies that there is any necessity for the appointment of an administrator upon said estate for the reasons above set forth; and even if there was that said Richard is not a proper person to entrust with its management, and he prays that the application be refused."

Richard L. Tapp, answering the complaint of J. T. W. Tapp filed in this proceeding, said:

"1. That article one of his complaint is true, except that the allegation that Mary Tapp 'was indebted to no one' is not true.

"2. That the whole of article two is wholly untrue, and he denies the same."

For a further defence the said Richard L. Tapp alleges:

"1. That the said note upon D. F. Thompson as referred to is the right and property of the testator of William H. Tapp, and at the time of the settlement with one Sam Thompson, the administrator of Josiah Thompson, a certain amount of money was paid over to William Tapp, being the share of the said Mary Tapp in the personal property of her father's estate, which said money was taken up from the table and kept by the said Mary without the knowledge or consent of the said William Tapp; that frequently the said William Tapp, by gentle means and persuasion, tried to obtain possession of the said money, but could not by such means do so; that the said Mary Tapp, still unknown to the said William Tapp, loaned the said money to Daniel F. Thompson, taking his note therefor, payable to herself, which note or bond she closely kept in her possession locked in a drawer until the day of her death, when the said J. T. W. Tapp, by some means unknown to the said Richard, got possession of the key of said drawer and took possession of the said note and holds the same unlawfully. That as to the last paragraph in the nature of a prayer the said Richard denies the same, and reiterates that, under the law, he is the proper person to administer upon said estate, and demands that letters be granted to him."

The Clerk, being of opinion that an issue of fact as to whether Mary Tapp left any estate was raised by the pleadings, transferred the proceedings to the Superior Court for trial, as provided in section 1382 of *The Code* of North Carolina.

His Honor Judge Brown, at August Term, 1893, of Orange Superior Court, rendered the following judgment:

"It is admitted that the only estate of Mary Tapp consists of an alleged claim to a certain note for $500 or $600 against one Daniel Thompson. It is contended by J. T. W. Tapp that he is the owner of said note, and therefore it is unnecessary to appoint an administrator, and it is contended that the title to this note should be tried in this proceeding. I don't think that is an issue of fact contemplated by section 1382 of *The Code*. The issues of fact there referred to are those growing out of a contested administration. It is not contemplated that the disputed title to property claimed for the intestate should be tried and determined under that section. If it should be determined in this proceeding that the said note was, or was not, the property of said intestate's estate, such judgment would not be binding on a future administrator of the estate, and if adverse to J. T. W. Tapp there is no method of enforcing the judgment. The presence of an administrator of Mary Tapp is essential to properly determine the title to this note. The respondent, J. T. W. Tapp, cannot be unjustly hurt, and it is no hardship upon him. If the administrator fails in his suit he would be mulcted with costs. If J. T. W. Tapp has acquired the note in the manner as alleged in the affidavit of Richard Tapp it ought to be investigated, and that can only be properly done in an action wherein the administrator of Mary Tapp is a party plaintiff and J. T. W. Tapp (and D. F. Thompson, possibly) defendants. The Clerk is directed to appoint Richard Tapp, or some other suitable person, other than J. T. W. Tapp, as administrator according to law."

From this ruling J. T. W. Tapp appealed.

Mr. J. W. Graham, for appellant.
Mr. J. A. Long, for appellee.

Per Curiam: For the reasons given by the Judge below the judgment is Affirmed.

B. H. COZART et al. v. H. C. HERNDON et al.

Contract—Corporation—Subscriber to Capital Stock—Liability as Stockholder—Evidence.

1. In order to constitute a contract there must be a proposal squarely assented to: an acceptance based upon terms varying from those offered is a rejection of the offer, and unless such counter-proposal is accepted and its acceptance communicated to the proposer there is no contract; therefore,
2. Where a corporation wrote to H. offering to buy his land for a certain amount of its capital stock, and he replied assenting to the offer upon the condition that he should reserve all the wood and timber on the land, and the directors on the same day voted to accept his proposition but such acceptance was not communicated to him, and about nine months thereafter H. withdrew his proposition, and there was no evidence that the stock was delivered or title made or any further action taken by either party in pursuance of such correspondence: *Held*, that there was no contract by which H. became a stockholder of the corporation.

Civil action, tried before *Bryan, J.*, at Fall Term, 1893, of Granville Superior Court.

From a judgment for the defendants the plaintiffs appealed. The nature of the action and the pertinent facts appear in the report of the case on a former appeal (113 N. C., 294) and in the opinion of Chief Justice Shepherd.

Mr. T. T. Hicks, for plaintiffs (appellants).

Messrs. Edwards & Royster and *Batchelor & Devereux*, for defendants.

Shepherd, C. J.: The general purpose of this action is stated in the opinion in this case when it was before us on a former occasion (113 N. C., 294), but in the present appeal the only question involved is whether the defendant H. C.

Herndon was a stockholder in the co-defendant company. His Honor instructed the jury that there was no sufficient evidence to establish such a relationship, and it is the correctness of this ruling which is alone presented for review.

No stock was issued to the said Herndon, nor does it appear that his name ever appeared upon the books of the company, nor that he ever held himself out, nor was, with his knowledge, held out as a stockholder. Thompson on Stockholders, section 174. The secretary, treasurer and the said Herndon testified that the latter was not a stockholder, and it cannot seriously be insisted that the mere suggestion of Herndon to James T. Cozart that he and his brother and brother-in-law ought to take stock in the company was in itself sufficient evidence to sustain the contention of the plaintiffs. The case, therefore, must be determined upon the effect of the correspondence between the company and the said Herndon. On the 15th of June, 1891, the company, through its president, addressed a letter to Herndon which contains the following language:

"We have considered the question as to the purchase of your fifty (50) acres, and while we think $300 an acre rather high in view of the fact that under the arrangements suggested in the first of this letter we have only placed a value of $200 per acre on the vacant Cozart property, yet we have decided to take the place for fifteen thousand dollars of the stock of the company, feeling that our joint interest will be promoted by concert of action.

"As several of our directors are from a distance we shall be glad to have a response from this at once."

On the same day Herndon replied as follows:

"As to my land adjoining the Philpott property, I think your company could very well afford to give me $20,000 of your stock for it. It would probably have a better effect here and also abroad than $15,000. If, however, you fail to take that view of it, I will accept the offer of $15,000 with this consideration, however, that I reserve, in making this transaction, all and every kind of wood and timber on the place for my own exclusive use and benefit."

At a meeting of the directors on the same day the following proceedings were had, as appears upon the minutes:

"On motion, the same (that is the proposition of Herndon) was accepted, and the treasurer directed to deliver stock upon receipt of deed, title being clear."

The defendant Herndon testified "that the condition upon which he proposed to sell to defendant company certain land (as set forth in his letter) was never accepted by said company, and that he withdrew his proposition to sell to said company about the 18th of March, 1892."

It does not appear that the resolution of the board accepting the proposition was ever communicated to said defendant, nor does it appear, as we have stated, that the stock was delivered, nor that title was made, nor, indeed, that any further action whatever was taken by either party in pursuance of the said correspondence.

It is well settled that in order to constitute a contract there must be "a proposal squarely assented to." If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, amendment or rejection. If the acceptance be not unqualified, or go to the actual thing proposed, then there is no binding contract. A proposal to accept or acceptance based upon terms varying from those offered is a rejection of the offer. 1 Wharton on Con., 4. "The respondent is at liberty to accept wholly, or reject wholly, but one of these things he must do; for if he answer not rejecting, but proposing to accept under some modification, this is a rejection of the offer." 1 Parson on Con., 476. "It amounts to a counter-proposal, and this must be accepted and its acceptance communicated to the proposer, otherwise there is no contract." Pollock on Con., 10.

Applying these general principles to the facts before us, it is plain that there was no contract by which the defendant Herndon became a stockholder. The proposal of the company was to purchase the land for $15,000 of its stock. Herndon's answer is not an acceptance, but a proposal to accept with the very important qualification that he is to reserve "all and every kind of wood and timber on the place for his own exclusive use and benefit." The acceptance of this proposal was never communicated to him, and after many months the proposal was revoked without objection, it seems, by the company.

We think his Honor was correct in holding that there was no evidence that the defendant Herndon was a stockholder. Affirmed.

P. J. LAMB, Administratrix of Elihu Meredith, v. S. H. WARD, Administrator of Uriah Lamb.

Action by Principal Against Agent—Pleading—Practice—Demand, when unnecessary—Statute of Limitations—Evidence—Witness.

1. Where, in an action by a principal against an agent for money due by the latter, the complaint does not allege a demand and refusal, a demurrer on that ground will not lie when in the answer, which contains the demurrer, a general denial of indebtedness is made and the statute of limitations pleaded.
2. Where a witness for plaintiff stated that the defendant's intestate had received money from plaintiff to manage for her it was not competent to ask him, on cross-examination, if he (the witness) had not stated to others that the money had been repaid; and, on the denial by witness of such statement, to prove that he had made

it, for, the evident purpose of defendant (upon whom the burden of proving payment rested) being to prove such payment by the witness, the defendant made the latter, in some degree, *his* witness and was bound by his answer to the question.

3. Notes of defendant's intestate in his handwriting and payable to the plaintiff, found among the papers of the former, were not admissible to show payment to plaintiff, there being no evidence that they were ever in the possession of the latter.
4. Where it appeared that defendant's intestate received money from the plaintiff agreeing to manage and lend it out for her and return it to her with six per cent. interest, and keep all that he got over six per cent. for his trouble as her agent, it was proper to charge the jury that if they found that the money was so received by defendant's intestate the agency existed, and the defendant's intestate was responsible for the funds and that the statute of limitations would not run until after demand.

CIVIL ACTION, tried before *Brown, J.*, and a jury, at August Term, 1893, of GUILFORD Superior Court.

The facts appear in the opinion of Associate Justice BURWELL.

From a judgment for plaintiff defendant appealed.

Mr. John A. Barringer, for plaintiff.

Mr. James E. Boyd, for defendant (appellant).

BURWELL, J.: The plaintiff, administratrix of Elihu Meredith, seeks in this action to recover of the defendant administrator of Uriah Lamb $800, which she alleges in her complaint she had put in the hands of his intestate to hold and account for as her agent under an agreement between him and her.

The complaint contained no allegation of any demand for an account and settlement either upon the defendant or his intestate.

The answer of the defendant set up three separate defences: 1. That the facts set out in the complaint do not constitute a cause of action, there being therein no averment of demand and refusal; 2. A denial of each allegation of the complaint; 3. The statute of limitations. His Honor overruled the first defence or demurrer, and the defendant excepted.

In *Wiley* v. *Logan*, 95 N. C., 358, it is said: "A demand previous to bringing an action for money collected by an agent is to enable the latter to pay over without incurring the cost of suit, for the principal must seek him and not he the principal. But a demand is not required where the agency is denied or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer. *Waddell* v. *Swan*, 91 N. C., 108, and cases cited."

The principle thus announced fully sustains the ruling excepted to. The whole answer was to be considered by the Court in passing upon the question. It would have been an idle thing to hold the plaintiff to the necessity of alleging and proving a demand that the answer itself showed was not required, according to the authority quoted above, and thus, for no good purpose whatever, postpone the trial of the substantial issues of the cause shown by the pleadings.

Second and Third Exceptions.—The plaintiff's husband, Shubal Lamb, upon his direct examination, testified to facts that tended to show that the defendant's intestate, his father, had received from the plaintiff administratrix the sum of money which she alleged in her complaint she had entrusted to him, and that he had agreed to manage the fund as her agent.

Upon his cross-examination he was asked if he had not told one Rush and also one Dundas, at times and places called to his attention, that his father had paid back to the plaintiff all the "Meredith money," meaning the money sued for here. He denied making such a statement to either of the persons named.

The defendant offered to show by those persons that this witness had made to each of them such a statement, but not in the presence of the plaintiff. This testimony was excluded, as it should have been. It was clearly incompetent for the defendant to establish the fact that payment of the sum demanded, or any part of it, had been made, by the unsworn statement of any one, whether plaintiff's witness or not. It was argued before us that it was competent "thus to contradict the testimony of the witness, Shubal Lamb, by his own previous statements, and thus impeach him." The reply to this is that the alleged previous statement would not be contradictory of the witness's evidence so far as that evidence related to those facts which it was incumbent on the plaintiff to prove. She sought to establish by his testimony that the defendant's intestate had received her money, and that he had received it as her agent. There is no inconsistency or contradiction between these two facts and the alleged statement. Indeed the statement, if truthfully made, would seem to pre-suppose the existence of one or both of these facts, for there would of course be no repayment of money unless it had been received for the plaintiff. The burden of proving payment, if the indebtedness was established, rested upon the defendant. It seems very patent that he sought to prove this fact by the witness. Using him for this purpose, he made him in some degree his witness, and is bound by his answer upon this question. He said that he knew nothing of any payment having been made. This, in answer to defendant's questioning, and under oath. Suppose he had made statements, not under oath, contradictory of this. That would not tend to show the payment had been in fact made. Suppose he had not uttered such statement, there would still be no proof of payment. What was proposed could, therefore, in no event aid the defendant. The credibility of a party's witness may be generally sustained or attacked by proof of his "general character." His evidence upon any particular matter may be impeached by evidence that upon another occasion he made a different statement about the same particular matter. Neither of these rules applies here.

Fourth and Fifth Exceptions.—The defendant offered in evidence two notes, one for $100, dated September 27, 1884, and one for $250, dated October 1, 1884, and testified that he found them among his intestate's papers after his death. They were both wholly in his handwriting and were payable to P. J. Lamb, one day after date. To the former was the signature of his intestate. From the latter that signature had been torn.

These papers seem to have been offered in order to show that the defendant's intestate had paid to plaintiff the sum of money named therein. We can see no reason whatever for admitting them for that purpose, there being no evidence that they were ever in the plaintiff's possession or that she ever knew of their existence. The defendant's counsel, feeling the necessity of showing the jury that the plaintiff had once held these notes, produced the following order:

"Mrs. J. P. Lamb:—Please send me order for one hundred dollars, ready filled up, payable to S. H. Ward, to the National Bank of Greensboro, N. C., and I will be responsible to you.

"September 27, 1884. (Signed) Uh. Lamb."

And he testified that the same was signed by Uriah Lamb: that he (witness) borrowed one hundred dollars and that Uriah Lamb gave him the foregoing order, and that he delivered it to the plaintiff and she gave him a check on the bank for the money; that he left the order with the plaintiff, and that after he administered he found it among Uriah Lamb's papers; that he gave his note to Uriah Lamb for the amount and repaid it and took up his note in Uriah's life-time. The above paper was admitted.

We see in this evidence nothing that can obviate the objection to the admission of either of the notes. The fact still remains that each of them is merely a written statement of the defendant's intestate, of which, so far as the evidence shows, the plaintiff had no knowledge. While it is true that from the existence of this paper, as discovered by the defendant, it might be conjectured that they once belonged to the plaintiff and had been paid, it is not allowable to submit to a jury facts that lay the foundation merely for a conjecture that the fact in controversy is true. There must be a recognized connection between the fact proved and the fact to be inferred, or the former is irrelevant. Besides, to admit such evidence as this would be to open a door for fraud.

Sixth Exception.—To show that the defendant's intestate had received her money as agent, and thus escape the effect of the plea of the statute of limitations, the plaintiff offered the testimony of her husband, Shubal Lamb, who testified that "he (defendant's intestate) said he would agree to pay her six per cent. on the money and return it to her and manage it as her agent and lend it out for her, and save her harmless, and that all he got over six per cent. he would keep for his trouble for acting as her agent."

The case recites that "At the close of the testimony defendant's counsel asked the Court, in writing, to charge the jury 'that according to the specific terms of the agreement made on the 29th of August, 1884, as testified to by Shubal

Lamb, Uriah Lamb, the intestate of the plaintiff, was not an agent of plaintiff, but borrowed and took the use of her money, to be repaid to her at six per cent. interest, and that the statute of limitations began to run from the time the money went into his hands, the last being shown to have gone into his hands September 29, 1884. This suit being brought since Uriah Lamb died in 1891, then, as a matter of law, more than three years having elapsed, the plaintiff's action is barred.' "

The Court did not give the instructions requested, but charged the jury as follows:

"The statute of limitations would begin to run against this debt if it was a loan by plaintiff to Uriah Lamb; that if the jury believe that a contract was entered into between the plaintiff and Uriah Lamb whereby the money was loaned to Uriah Lamb and he contracted to repay the principal and six per cent. interest, then the statute would run in this case and this action would be barred and the jury should answer the second issue, Yes."

The Court recited all the evidence upon this issue and said, "that if it was not a loan, but was placed in Uriah Lamb's hands as agent of the plaintiff, managing her money and lending it out for her, it would constitute a trust fund in the hands of Uriah Lamb and the statute would not run except from a demand, and there is no evidence of a demand more than three years before this action was commenced, and if the jury should so find that it was a trust fund placed in Uriah Lamb's hands to lend out and manage for plaintiff it would not be barred."

We think the defendant would have had no good cause for exception if his Honor, instead of giving the jury the instruction he asked for, had told them that the facts testified to by the witness Lamb, if found to exist, would establish the fact that the intestate of defendant was the plaintiff's agent, and was responsible as such agent for the funds placed in his hands. He certainly has no cause to complain of the instruction given. No Error.

THE BANK OF GUILFORD v. T. B. KEOGH et al.

In two actions brought by the plaintiff, the one against Harriet A. Keogh, a *feme covert*, Thomas B. Keogh and E. L. Gilmer, and the other against the two last named, upon two separate notes signed by all of said parties, there was judgment in both cases for the plaintiff against the defendants, T. B. Keogh and Gilmer, at May Term, 1893, of GUILFORD Superior Court, before *Bryan, J.*

Defendants appealed.

Mr. L. M. Scott, for plaintiff.

Mr. James E. Boyd, for defendants (appellants).

PER CURIAM: The plaintiff is so clearly entitled to recover of the appellants that we deem it unnecessary to discuss the several points presented on the appeal. Counsel with commendable candor was unable to insist with much earnestness upon any of the assignments of error to the rulings of the Judge below. The judgment in both cases must be Affirmed.

W. J. BENBOW AND WIFE v. MARY A. MOORE et al.

Equitable Conversion, when it takes effect—Jure Mariti—Choses in Action—Reduction into Possession by Husband—Resulting Trust—Practice—Judgment Valid When Made after Expiration of Term on Case Agreed Submitted to Judge.

1. Money directed by a will or other instrument to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and the subsequent devolution and disposition thereof will be governed by the rules applicable to that species of property.
2. Where a testator provided in his will for the sale of his lands to a certain person at a price to be ascertained by a prescribed method and for the division of the proceeds among his nieces, there was an equitable conversion of the land at the testator's death, in 1860, and the share of a niece then married became a chose in action and vested in the husband at the time, *jure mariti*, although the proceeds were not actually received by him until after the adoption of the Constitution of 1868.
3. Where, in such case, the husband invested the proceeds of the chose in action, so reduced into his possession, in land without any special agreement to invest and hold for the benefit of the wife, there was no resulting trust in her favor.
4. The legacy, notwithstanding an adverse claim was unsuccessfully made by another to the land so ordered to be sold, was the qualified property of the husband and upon its reduction into possession the title to it related back to the date of the testator's death and not to the time of its actual reduction.
5. A will made in another State will be construed according to the common law as expounded by the decisions of this Court, in the absence of proof that a different law or construction prevails in such other State.
6. A trial Judge has authority, under the agreement of counsel, to determine a case after the adjournment of Court, although his riding of the district be finished before his decision is rendered.

SPECIAL PROCEEDING for the partition of land and assignment of dower, commenced before the Clerk of the Superior Court of GUILFORD County and transferred to the Court in term, and tried upon a case agreed at December Term, 1892, before *Connor, J.*

The cause being duly called for trial, the jury chosen and impaneled, and the pleadings read, it was suggested by counsel that, as the controversy was one presenting a question of law, it should be submitted to the Court upon a case agreed, which was assented to, and immediately a statement was prepared by the counsel for the parties and handed to the Judge, who folded it and indorsed on the back of the paper the style and title of the cause and the words "Facts Agreed" and handed it to the Clerk. The jury was thereupon discharged for the hearing or consideration of the case. The "statement" was as follows:

"1. John Cunningham, of Davidson county, Tennessee, died in October, 1860, leaving a last will and testament probated in the proper Court of said State, of which a duly certified copy is hereto attached:

"'I, John Cunningham, of the county of Davidson and State of Tennessee, do make this my last will and testament:

"'First, out of my moneys on hand or due me at the time of my death, it is my wish that my debts be paid. It is my wish and will that my Aunt Letsey Coots, with whom I live, shall have the use of my two negro men, Randal and Tom, and any stock on the place belonging to me that she may need to cultivate the place for her support, as long as she may live. It is my wish that one thousand dollars be loaned out by my executor for the use and benefit of my afflicted niece, Miss Roberts, of North Carolina; the interest, one hundred dollars, to be paid her guardian yearly for her support as long as she lives. It is my wish and will that my negroes be allowed to choose their master or masters (Tom and Randal, at the death of my aunt, or before if she does not choose to keep them) and that the person so selected by them shall pay to my estate a moderate price, to be fixed upon each by three disinterested neighbors. Mothers of children under eight years of age to choose for such children, so as they may be kept together. It is my wish and will that my land (about one hundred and fifty acres) on which I live, including all reversionary interest, shall be sold to John Overton, at a price reasonable and fair, to be agreed upon by any three persons who may be acceptable to him and my executor, he paying the price fixed in one and two years. It is my wish and will that my executor pay over to my only living brother, James C. Cunningham, of North Carolina, four thousand dollars out of the first moneys coming into his hands, from collections, sale of negroes and stocks, after setting aside one thousand dollars for the use of my niece before mentioned. And lastly, it is my wish and will that all of the balance of the proceeds of the sale of my lands, negroes, etc., be equally divided, after the death of my Aunt Letsey, between all my nephews and nieces then living, except the niece to whom I have given the use of one thousand dollars, should she be alive. I constitute and appoint my neighbor, William D. Shute, my executor, and request that he may not be required to give security therefor. Witness this October 8, 1860. JOHN CUNNINGHAM, [Seal].'

"2. That Letsey Coots died in the year 1863.

"3. That on the death of John Cunningham Letsey Coots, legatee and devisee for life, filed a bill in equity seeking to set aside the disposition of the property in the will, she claiming that he had no right to dispose of the property, and on this bill it was finally adjudged that the will was operative and disposed of the property, and thereupon John Overton took the land, as provided in the will, in May, 1868, giving his notes in equal installments, due in one and two years, to the administrator with will annexed, for the aggregate sum of thirteen thousand dollars, or thereabouts, and the deed from the administrator to said Overton bears date May 18, 1869.

"That defendant Mary A. Moore, the wife of H. C. Moore, was one of the nieces of John Cunningham, and as such is a legatee or devisee under the will, and her share in the proceeds of the land was $1,957.22, which was sent to this State in checks payable to her and her husband upon the following dates and amounts, to-wit: September 16, 1870, $933.57; May 17, 1873, $125; July 8, 1873, $125; January 28, 1874, $285.71; June 6, 1874, $450; September 2, 1875, $38.

"That of the money received as above H. C. Moore, the husband of Mary A. Moore, paid $1,400 for the Mill tract in controversy on the 2d of November, 1870, and that deed therefor was executed to him in his own name, and he died in 1877.

"That H. C. Moore died in possession of this and his other lands, and at his death his wife, Mary A. Moore, continued to reside on the lands and has so resided ever since, receiving and using the entire rents and profits for herself and family.

"That H. C. Moore and Mary A. Moore were married in 1860, and before the death of John Cunningham, of Tennessee."

The statement was not signed by either of the counsel.

The Court being continuously engaged in the trial of causes until the adjournment, it was agreed by and between counsel that the "case agreed," together with the briefs of counsel, should be sent to the Judge at his home in Wilson, N. C., after the expiration of the term and be decided by him and judgment rendered as of the December Term, 1892.

The Court adjourned on the 19th of December, and this being the last term of the fall riding of 1892, the Judge left the district and returned to his home in the town of Wilson, in the Third Judicial District.

On the 18th day of January, 1893, the plaintiffs' counsel forwarded the papers in the cause, including the original statement of "Facts Agreed," to the Judge at his home in Wilson, N. C.

The delay in sending the papers to the Judge was caused by the engagements of defendants' counsel.

The plaintiffs' counsel, by letter, notified defendants' counsel, who resided in the same town, that the papers would be sent to the Judge on the 18th of January. The Judge began the riding of the Sixth Judicial District on the 16th of January in the county of Greene. On the 19th of January the defendants' counsel wrote to the Judge stating that he felt greatly embarrassed about the case, as he had been apprised, immediately after agreeing to the submission of the case, of some newly discovered testimony of great materiality, and requested his Honor, under the circumstances, not to consider the case. His Honor in reply stated that he had no disposition to decide the case unless all the facts as they really existed should be before him, and suggested that he, the defendants' counsel, should ask the plaintiffs' counsel to release him from the agreement. His Honor also wrote to the plaintiffs' counsel in regard to the matter, but they declined to consent to reopen the case. After waiting some weeks for the counsel to adjust the matter, and they failing to do so, his Honor, believing it to be his duty to render judgment upon the case as submitted to him, signed judgment in favor of the plaintiffs, and the defendants appealed, assigning as error:

"That the judgment signed by the Judge and placed in the office of the Clerk of the Superior Court of Guilford by plaintiffs' attorney on the 17th of March, 1893, is void and of no effect, because:

"1. The same was considered, determined and signed by the Judge three months, or nearly so, after the close of the term of the Court at which the cause stood for trial, the said term being December Term, 1892, which ended December 17, 1892, and the judgment having been placed in the Clerk's office on the 17th of March, 1893.

"2. The facts upon which the judgment is based were not during the term at which the case stood for trial found by a jury, nor by the Court, nor are the same signed by the counsel for the parties as facts agreed.

"That the judgment was determined by Judge Connor after he had left the district in which the case is pending, and after the intervention of another regular term of the Superior Court of Guilford County, where the case is pending.

"4. That the action of the Judge in the case was had and the judgment rendered in the town of Wilson, in the Third Judicial District, and outside of the Fifth District.

"That at the time of the consideration of the case and the rendition of the judgment by Judge Connor he was not the Judge of the Fifth Judicial District, nor was he, by law, authorized to exercise the functions of Judge of the Superior Court therein.

"6. That even with the consent of parties the law does not authorize a Judge out of term time, and after he has ceased to be the Judge of the district, to perform judicial or official acts to the extent of rendering final judgment on the merits in causes pending on the trial dockets in such districts, and any judgment concluded and rendered by a Judge under such circumstances is *non coram judice* and void.

"Defendants assign further for error that if the judgment filed is regular and of binding effect the same is erroneous, and is not warranted by the facts upon which the same was rendered, and that there is error in the conclusions of law made by the Judge on the facts presented; that the Judge should have held, on the facts presented, that the purchase-money of the land was at the time the separate property of the defendant Mary A. Moore, and not that of her husband, and that she is entitled to the land, and should have declared a resulting trust in her favor, The defendants except to the conclusions of law by the Judge and to the judgment itself."

Messrs. Dillard & King, for plaintiffs.
Mr. J. E. Boyd, for defendants (appellants).

SHEPHERD, C. J.: The defendant Mary A. Moore alleges that the mill tract mentioned in the pleadings was purchased by her husband, H. C. Moore, with money belonging to her separate estate, and she prays the Court to declare a trust in her favor against the heirs at law of the said H. C. Moore, to whom the legal title descended. The money used in the purchase of the land was the share to which the said Mary was entitled in the proceeds of certain lands in Tennessee which were sold under the provisions of the will of her uncle, John Cunningham, and was received by her husband subsequently to the adoption of the present Constitution. The question presented is whether this money was the property of the husband *jure mariti;* and as the marriage was contracted in 1860, and before the death of the testator in the same year, it is necessary to determine whether under the will there was an equitable conversion of the said lands into personalty. It is a familiar maxim in equity "that things shall be considered as actually done which ought to have been done," and it is with reference to this principle that land is, under some circumstances, regarded as money and money as land. It was at an early period laid down by Sir Thomas Sewell, M. R., in the leading case of *Fletcher* v. *Ashburner*, 1 Bro. C. C., 497, "that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land."

This principle is so universally accepted that it is needless to cite additional authority in its support and it is equally well settled "that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property." 1 Williams on Exrs., 551; *Smith* v. *McCrary*, 3 Ired. Eq., 204; *Brothers* v. *Cartright*, 2 Jones' Eq., 113; *Conly* v. *Kincaid*, 1 Winston Eq., 44; *Proctor* v. *Ferebee*, 1 Ired. Eq., 143; Adams' Eq., 136.

It is undoubtedly true, as contended by counsel, that this constructive conversion cannot take place unless there is imposed upon the executor or other trustee an imperative duty to sell, arising either by express command or necessary implication. These conditions, however, are fully met in the present case, as the will expressly directs that the land shall be sold, and the provision that it shall be sold to a certain person (John Overton) at a price to be ascertained in the manner prescribed does not affect the operation of the principle when the price has been actually ascertained and paid and a conveyance duly executed. If the imperative duty of selling had not been imposed, and it had been left entirely to the discretion of the executor, there would have been no conversion until the contemplated purchaser had exercised his option and a contract of sale actually made. If, however, there is a *binding* contract to convey upon the option of the vendee, and the vendee exercises the option, the conversion will relate back to the time of the execution of the contract. "Thus" (says Mr. Pomeroy, 3 Eq. Jur., 1163) "where a lessee with an option to purchase, or any other purchaser with an option, duly declares his option after the death of the lessor or vendor, who is the owner in fee, the realty is thereby converted retrospectively as between those claiming under the lessor or vendor, or under his will—that is, as between the heir or devisee on one side and the legatees or next of kin on the other, the proceeds will go to his personal representatives, though the heir or devisee will be entitled to the rents up to the time when the option is declared." Bispham Eq., 321; 1 Beach Eq. Jur., 524; Adams' Eq., 141. This principle is equally applicable where the duty to sell is imposed by will. Indeed, it has been well remarked that "The question of conversion is one of intention, and the question is, Did the testator intend to have his real estate converted into personalty immediately upon his death? If he did a court of equity must give such intent effect, and treat the realty as personal property from that time." *Clift* v. *Maser*, 116 N. Y., 144; Beach Eq. Jur., 522.

"It is presumed," (says Judge STORY, 2 Com., 791) "that the parties in directing money to be invested in land, or land to be turned into money, intend that the property shall assume the very character of the property into which it is to be converted, whatever may be the manner in which that direction is given."

"The doctrine," says Mr. Bispham, "is to be applied to all those cases in which a general intention of the testator is sufficiently manifested to give the property to the donee in a condition different from that in which it exists at the time when the will goes into effect. * * * The question always is, Did the testator intend to give money or to give land, and has that intention been sufficiently expressed? Once arrived at the intention by proper rules of interpretation, and the property will then be considered as impressed with that character which the testator designed it should bear when it reached the hands of the beneficiary." Bispham Prin. Eq., 312.

We have referred to the foregoing authorities because some stress seems to be placed by counsel upon the method in which the sale was to be made, whereas the controlling idea is whether the testator intended to change the character of the property. If this be clear, then, if the purchaser comply with the terms of the sale provided in the will, it is the duty of the Courts to give full effect to his intention by declaring a conversion at the date of his death. Looking, then, beyond the express direction to sell, and considering the general purpose of the will as indicated by its context, it is clear that the testator intended a conversion of all his real property. There is nothing to indicate that he intended to die intestate as to any portion of his property and especially of his realty, as he makes no disposition of it in that character, but provides that the proceeds of its sale, together with that of the personalty, shall be divided among certain of his nieces and nephews. The authorities are united to the effect that where there is an express or implied direction to convert the property the manner of the sale is immaterial. Here there is no contingency upon which the power is to be exercised. The direction to sell is positive and unequivocal and the method in which the price is to be ascertained is a mere incident to the exercise of the power and nothing more. If, as we have seen, the principle of equitable conversion applies, there is no question but that the sale when made relates to the death of the testator. Pom. Eq. Jur., 1162; Bispham Eq., 320; *Conly* v. *Kincaid, supra*; *Smith* v. *McCrary, supra*; *Proctor* v. *Ferebee, supra*. The land, then, having been converted at the date of the death of the testator, the share of the said money was a chose in action (*Matthews* v. *Copeland*, 79 N. C., 493), and under the cases just cited vested in the husband at that time provided he reduced it into possession during the coverture. This right to reduce it into possession was a vested right and the husband could not be deprived of it by a subsequent change in the law. *O'Connor* v. *Harris*, 81 N. C., 279; *Morris* v. *Morris*, 94 N. C., 613. The husband having actually reduced the chose in action into possession and invested it in the land without any special agreement to invest and hold for the benefit of the wife (*Kirkpatrick* v. *Holmes*, 108 N. C., 206), we concur in the conclusion of the learned Judge below that there is no resulting trust.

The contention that the legacy did not vest in the husband because of the adverse claim of Letsey Coots to the property mentioned in the will (which was finally decided against her) is wholly untenable. The authority cited (*Caffy* v. *Kelly*, Busb. Eq., 48) applies to cases where, upon the marriage, chattel property of the wife is in the adverse possession of another. In such a case the wife has but a mere chose in action, which does not vest absolutely in the husband upon the marriage. 1 Bish. on Married Women, 71. This chose in action, however, like any other, becomes the qualified property of the husband upon the marriage, and if, as in the present case, it is reduced into possession during the coverture the title to it relates to the marriage and not to the time of its actual reduction into possession. *O'Connor* v. *Harris, supra.*

The objection to the authority of the Judge to determine the case under the agreement of counsel after the adjournment of the Court, is also without merit. *Harrell* v. *Peebles*, 79 N. C., 26; *Shackleford* v. *Miller*, 91 N. C., 181. And we do not see how, under the circumstances, his Honor could have refused to proceed to judgment unless a motion had been distinctly made (which was not done) for a reopening of the case upon the ground of newly discovered testimony. This, however, would have been purely a matter of discretion and not reviewable by this Court, unless the Court had explicitly declined to entertain such motion on the ground of a want of power. *Brown* v. *Mitchell*, 102 N. C., 347.

In conclusion, we will observe that we have construed the will and the rights of the husband thereunder according to the principles of the English common law and equity, as expounded by the decisions of this Court and other authorities whose views are adopted by us. These, in the absence of proof that a different law or construction of the law prevails in Tennessee, must govern this case. *Worrell* v. *Vinson*, 5 Jones, 91; *Cade* v. *Davis*, 96 N. C., 139. The judgment is Affirmed.

STATE ex rel. MARY COGGINS v. J. T. FLYTHE et al.

Practice—Parties—Abatement—Supplementary Complaint—Discretion of Judge.

Where two of several plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding Judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause.

This ACTION was commenced by summons issued March 9, 1878, returnable to Spring Term, 1878, of NORTHAMPTON Superior Court, in the name of the State of North Carolina on the relation of Mary L. Coggins and husband, K. R. Coggins, Thomas C. Harris, Martha Harris and Addie Harris, as plaintiffs, against the defendants.

The action was referred to R. O. Burton, Esq., as referee. After several hearings before said referee, and before he made his report, Martha A. Harris and T. C. Harris died—the former in 1882 and the latter in 1883—and it was admitted before said referee, at a hearing on the 27th July, 1886, that the said T. C. Harris and Martha had died intestate, and that no administrator had qualified on either of their estates. T. C. Harris became of age June 9, 1875, and Martha A. Harris June 12, 1879. The referee continued to take evidence after the death of Thomas and Martha, and on the 12th day of December, 1888, filed his report as to the accounts between the defendant Flythe and Mary L. Coggins, and Addie, who married John E. Pepper pending the action, but did not state the account between the said Flythe and his wards, Thomas and Martha Harris. In consequence of exceptions to said report sustained the matters between Mary L. Coggins and Addie Pepper and defendants were referred back to said referee, and on March 22, 1890, he filed his second report. Exceptions to this report were heard at Spring Term, 1892, and final judgment was rendered as between the defendants and Mary L.

Coggins and Addie Pepper and their husbands. From this judgment the defendants appealed, and the said Mary L. Coggins and Addie Pepper and their husbands appealed to the Supreme Court of North Carolina, and in said Court final judgment was rendered at Fall Term, 1893, as between the defendants and said Mary L. Coggins and Addie Pepper, and said judgments are still unsatisfied. Said judgments were certified to the Court below prior to December 4, 1893.

No letters of administration on the estate of either Thomas or Martha Harris were taken out until April 1, 1893, when J. A. Burgwin qualified as administrator on the estates of both before the Clerk of said Superior Court, and on the 10th day of April he filed affidavit to that effect in the cause; and at the August Term, 1893, he made a motion in open court, the counsel for defendants being present, to be allowed to be made parties plaintiff as administrator of Thomas C. Harris and as administrator of Martha Harris, and the motion was continued. Owing to the sickness of Judge Bynum there was no Fall Term of said Superior Court, and at the Special Term, December 6, 1893, the motion was heard before *Whitaker, J.* No motion had ever been made upon notice to the parties in interest to abate the action as to said Thomas and Martha Harris. The motion was resisted, upon the ground that it came too late—after the death of Thomas and Martha Harris, and after final judgment between defendants and Mary L. Coggins and Addie Pepper and their husbands. The motion was allowed, as appears by the judgment of record, and defendants appealed.

Mr. R. B. Peebles, for plaintiff.
Mr. Thomas W. Mason, for defendants (appellants).

MACRAE, J.: The action did not abate upon the death of the two plaintiffs, Thomas C. and Martha A. Harris. The cause remained upon the docket and was proceeded with at the instance of the surviving plaintiffs, whose rights have now been determined. There being no personal representative of the deceased plaintiffs, no motion was made within a year after their death to continue the action as to them. It was within the power of the defendants at any time after their death to have applied to the Court to have the action abated as to them unless proper parties were brought in, but as this was not done it was entirely within the discretion of the presiding Judge to allow their representative to file a supplementary complaint and prosecute the action upon his motion to that effect, made before the final determination of the cause. *The Code*, §188; *Baggarly* v. *Calvert*, 70 N. C., 688; *Moore* v. *Railroad*, 74 N. C., 528.

Affirmed.

W. F. GRUBBS v. CHARLES STEVENSON.

Trial—Evidence—Impeaching Testimony.

In the trial of a material issue it was not competent to show by the plaintiff, on cross-examination, that at a previous trial the same issue had been found against him, for such fact could not impeach the witness nor throw light upon the pending issue, which depended upon the facts as testified to on the trial and not on what opinion the former jury had of the matter.

CIVIL ACTION, tried at August Term, 1893, of NORTHAMPTON Superior Court, before *Bryan, J.*, and a jury, in which the main issue was whether the relation of landlord and tenant existed between the parties.

The plaintiff, after testifying that he had rented the land to the defendant and had made advances which he sought by the action to collect, was asked whether on a former trial of the action the question whether he was landlord of the defendant had not been found against him, to which, after the overruling of his objection, he answered "Yes."

There was a verdict for the defendant, and from the judgment thereon plaintiff appealed.

Mr. R. B. Peebles, for plaintiff (appellant).

Mr. W. H. Day, for defendant.

CLARK, J.: The defendant asked the plaintiff, who was a witness in his own behalf, "if the question whether he was landlord of the defendant was not before tried in this action and found against the plaintiff," stating that the purpose of the question was to impeach the witness. The question was admitted over the plaintiff's objection. The witness answered yes. The plaintiff excepted. We fail to see how the fact that another jury in trying the case had found this fact against the plaintiff could impeach him. Still less was it competent to throw light upon the question at issue whether the relation between the plaintiff and defendant had been that of landlord and tenant. That depended upon what was the agreement between the parties, and not upon the opinion which a jury in a former trial had formed in regard to it. It may be that if the witness had answered no, the error would have been harmless and disregarded on that account. But he answered yes. This was to throw into the jury-box the weight of the opinion of a former jury upon the matter in issue, and was calculated to prejudice the plaintiff.

Error.

GEORGE T. DAVIS, Executor, et al. v. JOHN R. WHITAKER et al.

Constructive Notice—Filing Deed for Registration—Registration—Failure of Register to Index.

1. The filing of a deed for registration is in itself constructive notice; and hence,
2. The failure of the Register of Deeds to index a deed which has actually been registered cannot impair its efficacy.

CIVIL ACTION, tried before *Graves, J.*, at March Term, 1894, of HALIFAX Superior Court, on an agreed statement of facts of which those necessary to an understanding of the decision are set out in the opinion of Chief Justice SHEPHERD.

From a judgment for the plaintiffs the defendants appealed.

Mr. R. O. Burton, for plaintiffs.
Mr. J. M. Mullen, for defendants (appellants).

SHEPHERD, C. J.: The only question presented for our consideration is whether the deed to Spier Whitaker, trustee, was properly registered, so as to give it priority over the deed executed to Dobie & Co. on the 28th January, 1890. The deed to Whitaker was duly admitted to probate on the 15th of January, 1883, and ordered to be registered with the certificate of the Clerk of the Superior Court, and on the same day, together with the fee for its registration, it was delivered by the Clerk to the Register of Deeds, who made thereon the following indorsement: "Received and recorded January 15, 1883, in Book 69, at page 395." The deed was duly registered on that day, but the Register of Deeds failed to index the same either in the book in which it is registered or in the cross-index provided by section 3664 of *The Code.*

It is laid down in Jones on Mortgages (Vol. I, sec. 553) that "The general policy of the recording acts is to make the filing of a deed, duly executed and acknowledged, with the proper officer, constructive notice from that time; and although it be provided that the Register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed not for the protection of the party recording his conveyance, but for the convenience of those searching the records; and instead of being a part of the record it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed as well as recorded in order to make it a valid notice."

That the filing of the deed with the Register had the effect of registration has always been understood to be the law in this State, and such very clearly has been the construction put by this Court on the Act of 1829, which now constitutes section 3654 of *The Code.* *McKinnon* v. *McLain*, 2 Dev. & Bat., 79; *Metts* v. *Bright*, 4 Dev. & Bat., 173; *Parker* v. *Scott*, 64 N. C., 118. In the case last named the Court said: "The deed in trust was delivered to the Register for registration at 10 o'clock A. M. on the 20th day of December, 1866, and was actually registered on the 20th day of January, 1867, as appears from the certificate of the Register. In contemplation of law the deed in trust was duly registered from the time of its delivery to the Register, and from that time was good against creditors." The case of *Moore* v. *Ragland*, 74 N. C., 343, is not in conflict with this well-established doctrine, as it appears that the mortgage was left with the Register with directions "not to register the same until he should be thereafter required by the plaintiff to do so." In contemplation of law the mortgage had not been delivered to the Register for registration.

In some of the States such effect is not given to the filing for registration, but even in those States, with but one exception, it is held, says Judge FREEMAN, "that a deed properly filed and copied into the record is recorded within the meaning of the registration laws and imparts notice to subsequent purchasers, notwithstanding the failure of the recorder to properly index it, and that the index is no part of the record." See note to *Green* v. *Garrington*, 91 Am. Dec., 109, in which many cases are cited sustaining the views of the annotator.

In consideration of the decisions of this Court, agreeing as they do with the preponderance of authority in other jurisdictions, we do not feel justified in departing from the doctrine that the filing for registration is in itself constructive notice; and if this be so, it must follow that the failure of the Register to index a deed, which has actually been registered, cannot impair its efficacy.

It is true that in *Dewey* v. *Sugg*, 109 N. C., 328, it was held to be essential to a judgment lien that it should be properly indexed, but the decision turned upon the construction of the statute, and the indexing was considered to be an essential element to the creation of that particular kind of lien. A judgment must be actually docketed by a compliance with all the statutory requirements before it becomes a lien, whereas, as we have seen, a registration is valid upon the mere filing for registration.

In the absence of more explicit legislation we cannot hold that the statute directing the indexing of deeds, etc. (*The Code*, §3664), has the effect of repealing the existing law as declared by this Court. Affirmed.

ALLEN A. SANDERS v. CYRUS THOMPSON et al.

Certiorari—Practice—Docketing Appeal—Non-payment of Clerk's Fees for Sending up Transcript.

1. An appellant, instead of docketing the appeal during the September Term of this Court (as might have been done, the appellee not having moved to docket and dismiss), toward the latter part of the Term (December 16, 1893) applied for a *certiorari* to be heard on December 18th; the required time of notice was not shortened by the Court and the notice itself was not given to the officer for service until the 12th January, 1894: *Held*, that on account of the laches and irregularity of petitioner the writ will not be issued.
2. The Clerk of the Court below is entitled to receive his fees before being required to send up a transcript on appeal, and, therefore, a writ ef *certiorari* will be refused where it appears from the affidavit of the Clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the Clerk's affidavit the petitioner did not tender the fees.
3. Where an application for *certiorari* states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue.

This was a PETITION of the plaintiff for an order directing a writ of *certiorari* to issue to bring up an appeal.

Messrs. F. M. Simmons and *T. B. Womack*, for plaintiff (petitioner).

Messrs. Battle & Mordecai, for defendants.

CLARK, J.: This cause having been tried below at Spring Term, 1893, the appeal should have been docketed in this Court before the perusal of the district to which it belonged at Fall Term. It is true that as the appellee did not move to docket and dismiss, the appeal could have been docketed at any time during said Fall Term (113 N. C.). But instead of so docketing the appeal the appellant, on December 16, 1893, near the end of the Term, applied for a *certiorari*, the motion reciting that the petition was to be heard on December 18th. Ten days' notice was not given as required by Rule 43, nor was the time shortened by the Court. The petitioner's counsel himself fixed the time at two days, and December 18, 1893, as the day the motion was to be heard, but did not place the notice in an officer's hands for service till January 12, 1894. Such laches and irregularity do not entitle the petitioner to the benefit of a *certiorari*, which should be asked for in apt time and upon due notice.

Apart from this the application is resisted on the affidavit of the Clerk that the transcript was not sent up because he repeatedly demanded his fees for the same and the appellant failed to pay them. This the Clerk was entitled to demand (*Andrews* v. *Whisnant*, 83 N. C., 446; *Bailey* v. *Brown*, 105 N. C., 127), except in criminal actions (*State* v. *Nash*, 109 N. C., 822). The petitioner's counsel, in reply, does not deny this beyond saying he does not recollect the fees being demanded, but though put on notice by the answer he still does not tender the fees for the transcript. It would be an anomaly if the transcript could be brought up by *certiorari* without tender or payment of the fees therefor when the appeal could not be brought up direct without such payment or tender. The petitioner furthermore avers that the papers in the cause have been lost or destroyed, but does not aver or show any steps taken below to supply them. As was said in *Peebles* v. *Braswell*, 107 N. C., 68, "it would be a vain thing to send a *certiorari* down for papers which are not in the office and to supply which no steps have been taken." The petitioner has not shown proper diligence nor proceeded in the proper mode to be entitled to a *certiorari*. The application was made at almost the latest possible moment, ten days' notice was not given, nor was any notice served before the day mentioned in the notice, December 18th. The papers asked to be sent up are averred by the petitioner to be non-existent and no steps are taken to supply them, and the fees for the transcript are not paid or tendered, though the answer to the petition shows that they were demanded by the officer, as he had a right to do. Petition Denied.

T. W. CARR AND WIFE v. O. W. DAIL et al.

Mortgage—Mortgagor in Possession—Right of Mortgagee to Crops—Priority of Agricultural Lien.

Where a mortgagor was allowed to remain in possession and during such possession executed an agricultural lien under which he obtained advances in aid of the cultivation of the crop; and upon a suit for foreclosure the lands and rents were put into the hands of a receiver: *Held*, that, although the agricultural lien was improperly registered, it was good as between the lienee and mortgagor, and that equity would not subject the rents in the hands of the receiver to the payment of the mortgage indebtedness, except in subordination to the claim of such lienee, to be reimbursed to the extent of the advances made in aid of cultivation of the crops up to the time of the sequestration.

(Syllabus by SHEPHERD, C. J.).

CIVIL ACTION, heard before *Bryan, J.*, at November Term, 1893, of GREENE Superior Court, upon an agreed statement of facts, of which a sufficient synopsis is given in the opinion of Chief Justice SHEPHERD.

The interpleader, Parker, who claimed a lien for advances to the mortgagor while in possession, but whose mortgage was improperly registered, appealed from the judgment declaring his mortgage invalid as against the plaintiff mortgagee.

Mr. George M. Lindsay, for plaintiffs.
Mr. T. C. Wooten, for defendants (appellants).

SHEPHERD, C. J.: In the case of *Killebrew* v. *Hines*, 104 N. C., 182, we had occasion to discuss at some length the rights of a mortgagee to the crops cultivated by a mortgagor in possession. We then declared, in accordance with well-settled principles, that a mortgagor in possession is the owner of the crops; that the mortgagee has no legal property rights therein, and that even when he enters he holds them as a mere incident to his right to the possession of the land. In such a case he is held to a strict account and the crops are only chargeable in equity with the mortgage indebtedness when the land is insufficient in value to discharge it. "Equity makes the mortgage, as between the mortgagor and mortgagee, a charge upon the rents and profits whenever the mortgagor is insolvent and the security is inadequate. In this respect it is said by some authorities that 'the land with all its produce' is regarded as a security for the mortgage debt, as between the mortgagor and mortgagee, and where the security of the land is hazardous or already insufficient, a receiver may be appointed for the purpose of subjecting the rents and profits of the mortgaged land, thus charging the produce with an *equity*, though up to the time of sequestration there was no lien upon it." It was also stated in the opinion that though the products might be so subjected they could not be said to be encumbered so as to give a preference to a mortgagee as against another creditor who had previously obtained an express lien upon the same. We further observed that "even after entry or sequestration, where the mortgagor has been permitted to remain in possession and cultivate the soil, the lien for advances in aid of the cultivation of the crops must prevail. We put this on the ground that this implied agreement to remain in possession must be presumed to have been made with reference to the general law, and it provides that the agricultural lien shall be superior to all others, except that of the landlord. Another reason is that equity will not charge the crops so as to defeat the superior equity of the lienee, who has borne the expense of their cultivation and production. To hold that under such circumstances the mortgagee may enter and appropriate to his exclusive use the entire crop would be dealing a fatal blow to a numerous class of agriculturists in this State, many of whom are so unfortunate as to have their lands encumbered by mortgages."

Applying these principles to the case before us, we are of the opinion that there was error on the part of the Court in ruling that the interpleader, Parker, was entitled to no relief. It does not appear that there were any proceedings to foreclose, as to the land on which this crop was cultivated, until the 27th of March, 1893; nor does it appear that the crops were then sought to be sequestered. The mortgagor, therefore, up to the time of the entry of the mortgagee, was occupying the land under an implied agreement that he might cultivate it for that year, and in pursuance thereof had obtained supplies from Parker, and had presumably at the time of the entry actually planted the crops. It may be true that this implied agreement might be revoked as between the mortgagor and mortgagee, but until this was done by entry or proceedings to sequester, Parker had a right to deal with the mortgagor as one entitled to the possession of the land, at least to the extent of being protected by way of his agricultural lien for the amount of the advances already made. The mortgage of

Parker, according to the facts agreed, was executed in January, 1893, for the purpose of securing such advances, and, although improperly registered, was an effectual lien between the parties. The decree permitting the entry of the mortgagee was modified in a few weeks after it was made, and the land and its future products were put into the hands of receivers, who are now in possession of the rents, awaiting the direction of the Court. During his brief period of possession it does not appear that the mortgagee made any advances whatever, and all that he did, so far as the record discloses, was to adopt the tenants in possession as his own. He now prays the Court to turn over to him all of the said rents without paying to the said Parker the advances made by him in aid of their production. Nothing but some express provision of law can authorize the Court to give its sanction to so inequitable a result, and we are glad to say that we have found nothing in our decisions or statutes which deprives the interpleader of his right to be reimbursed for advances made during the possession of the mortgagor.

As the case now stands, in view of the modification of the decree of the Court putting the possession of the land and the crops into the hands of the receivers, we cannot regard the possession of the tenants, as against the interpleader Parker, as the possession of the mortgagee, and the present action must therefore be considered as a proceeding on the part of the mortgagee to charge the said rents with an equitable lien, the proceeds of the land having been found insufficient to discharge the mortgage indebtedness. In other words, he prays the equitable aid of the Court to place him in the same position which he would have occupied had he been in the possession of the land at the time of the maturity of the crops and had thereby acquired the actual possession of the latter. The question is, Shall this be done to the prejudice of Parker's claim, to be reimbursed the amount advanced by him while the mortgagor was in possession? As we have said, Parker now has an effectual lien as against the mortgagor. The mortgagee has no lien whatever, and we do not see how the Court can *create* a lien in his favor as against Parker without contravening one of the fundamental principles of our jurisprudence embodied in the maxim "that he who seeks equity must do equity." Even had the mortgagee been permitted to remain in possession it would be questionable whether he could defeat the rights of Parker, but where, as in this case, he neither has the possession of the land nor crops, and is seeking equitable relief, we think it very clear that his relief must be subordinated to the superior claim of the said interpleader. Had the agricultural lien been registered there can be no doubt as to Parker being entitled to relief (Acts 1889, ch. 476), and for the reasons given the want of registration, under the peculiar circumstances of this case, cannot, as against the mortgagee, change the result.

The case of *Spruill* v. *Arrington*, 109 N. C., 192, cited by plaintiffs' counsel, is easily distinguishable from this in that the entry was made by a purchaser under a decree of foreclosure, there was a change of possession, and furthermore the Act of 1889 was enacted after the execution of the agricultural lien, and therefore inapplicable.

The judgment must be reversed and the rights of the parties adjusted according to the principles declared in this opinion. Reversed.

W. T. WORTHINGTON et al. v. SIMON COWARD et al.

Drainage of Lowlands—Report of Commissioners—Power of Clerk to Hear Testimony or Re-refer to Commissioners—Discretion of Judge.

1. Chapter 253, Acts of 1889, concerning the drainage of lowlands, does not expressly repeal section 1298 of *The Code* providing for the duty of commissioners, but leaves in operation such of the provisions as are not repugnant to such Act of 1889.
2. Upon the hearing of the report of commissioners appointed to lay off a ditch for draining lowlands it was error in the Clerk to refuse to hear witnesses offered by parties excepting to the report, on the ground that he could not legally do so.
3. On appeal from the judgment of the Clerk upon the report of commissioners appointed to lay off ditch for drainage of lowlands the Judge could set aside the report either for cause or in his discretion, if, in his opinion, the ends of justice could be subserved by that course.

This was a SPECIAL PROCEEDING, before John W. Blount, Clerk of the Superior Court of GREENE County, for drainage of lowlands.

Upon the coming in of the report of the committee appointed and sworn to lay off said ditch or canal John Patrick, Gatling Ormond, L. G. Rouse, Calvin Allen and Simon Coward excepted to the report of the committee. But upon the hearing before the Clerk, on the 15th day of September, 1893, the Clerk overruled these exceptions and entered the following order or judgment:

"This cause coming on to be heard upon the report of the committee and the exceptions thereto filed by the following parties to this proceeding, viz., John Patrick, Gatling Ormond, L. G. Rouse, Calvin Allen and Simon Coward, who objected to the confirmation of the report, the said parties so objecting offer to prove to the Court, by sworn testimony, the facts set forth in their written exceptions as ground for setting aside the report. The Court, being of opinion that it cannot legally hear the proof and testimony so offered, it being solely a matter for the committee, refuses to hear the same and finds that there is sufficient matter found by said committee to enable the Court to proceed to judgment. Thereupon it is adjudged that the exceptions aforesaid be overruled and that the said report be and is in all respects confirmed. It is further ordered and adjudged that the ditch mentioned in the petition and laid off by the said committee be dug and made as recommended by said committee.

JOHN W. BLOUNT,
"*Clerk Superior Court.*"

To the foregoing judgment John Patrick, Gatling Ormond, L. G. Rouse, Calvin Allen and Simon Coward excepted, and asked for an appeal to the Judge holding the Superior Courts of this district.

Upon the hearing before *Bryan, J.*, at November Term, 1893, of the Superior Court of GREENE County, of the appeal from the judgment of the Clerk, his Honor reversed the judgment of the Clerk and remanded the cause to the Clerk for further proceeding; to which judgment and ruling the plaintiffs W. T. Worthington and all other parties to this proceeding, save John Patrick, Gatling Ormond, L. G. Rouse, Calvin Allen and Simon Coward, excepted and appealed.

Mr. George M. Lindsay, for plaintiffs (appellants).
Mr. Swift Galloway, for defendants.

AVERY, J.: The late statute (Laws 1889, ch. 253) does not in terms repeal section 1298 of *The Code*, and therefore leaves in operation such of its provisions as are not repugnant to the subsequent enactment. The Clerk, upon the hearing of the report of the commissioners appointed to lay off the ditch described in the petition, on exceptions filed thereto by four of the petitioners, declined to hear evidence offered by said parties on the ground that he could not "legally hear the proof and testimony so offered, it being a matter for the committee," and that there was sufficient matter found by said committee to enable the Court to proceed to judgment. It seems to us that this report is to be treated, for some purposes at least, just as that of a referee made to the Superior Court would be. *Railroad* v. *Phillips*, 78 N. C., 50; *Railroad* v. *Parker*, 105 N. C., 249. But, in any view of the question, the Judge had the same power as if the report had been submitted directly to him, and might, without explicit authority conferred by the statute, set it aside either in his discretion or for cause. *Skinner* v. *Carter*, 108 N. C., 108; *Bushee* v. *Surles*, 79 N. C., 51. The report being submitted directly to the Clerk, acting for the Court, he had the power to re-refer the matter to commissioners for a fuller report, upon the ground that it was in his opinion not sufficiently full as to the dimensions of the ditch, the benefits to the parties, or the area of drainage to enable him to pass upon the objections to it intelligently. He might, in the exercise of a sound discretion, have heard or declined to hear affidavits or evidence offered only for his own enlightenment, but it was error to refuse to hear the witnesses on the ground that he was not authorized by law to do so. *Hanes* v. *Railroad*, 109 N. C., 492; *Skinner* v. *Carter*, *supra*. Having waived all claim, if any existed, to a trial by jury when no objection was made to the appointment of commissioners, the parties whose lands were condemned had a right to appeal to the discretion of the Clerk first, and then of the Judge, either without examination of witnesses, on the ground that the report should have set forth more fully the facts in order to an intelligent exercise of the discretionary power, or, after hearing testimony or affidavits, to have the report set aside and the matter in controversy re-referred to the commissioners. The express power given in the statute in reference to condemning land for the use of railroad companies is merely declaratory of the right that already existed. *Railroad* v. *Phillips, supra; Skinner* v. *Carter, supra.*

For the reasons given we think that the Judge had the power to reverse the judgment of the Clerk because of the erroneous view of the law upon which the latter acted, or in the exercise of a sound discretion, if in his opinion the ends of justice required that course to be pursued.

No Error.

THOMAS MOORE v. J. T. SUGG, Tax-collector.

Arrears of Taxes—Mortgagee—Purchaser Without Notice—Foreclosure Sale.

The Act of 1891, ch. 391, authorizing the sale of land for taxes in arrears for the years 1881 to 1886, inclusive, provided that such sale should not affect purchasers of land who had no notice of such unpaid taxes.; M., the assignee of a mortgage on land, had, at the time of the transfer to him, no notice that there were any unpaid taxes due on the mortgaged land, but at the time and prior to the sale of the land under foreclosure proceedings at which he bought he had such notice: *Held*, that, as the title acquired at a foreclosure sale relates back to the date of the execution of the mortgage, the land was not liable for taxes assessed against it before the date of the mortgage.

This was an ACTION by plaintiff against J. T. Sugg, Tax-collector of Greene county, to sustain the sale of land for taxes. The referee to whom the case was sent by the Court below found, as a matter of fact, that the plaintiff, in 1889, purchased certain land at a foreclosure of mortgages which had been assigned to him, and that at the time of the execution or assignment to him he had no notice that there were any unpaid taxes due on the land for the years 1881 to 1886, inclusive, but that prior to the foreclosure sale at which he purchased he had notice that there was a claim for such taxes.

The referee's conclusions of law and the exceptions to the same are set out in the opinion of Associate Justice BURWELL. From a judgment of *Bryan, J.*, at November Term, 1893, of GREENE Superior Court, overruling the exceptions of defendant to the referee's report, the defendant appealed.

Messrs. T. C. Wooten and *L. V. Morrill,* for plaintiff.
Mr. G. M. Lindsay, for defendant (appellant).

BURWELL, J.: When this cause was here on a former appeal (112 N. C., 233) it was declared that the injunction should be continued in force till the hearing. There was afterwards in the Court below an order of reference, and the referee, having found certain facts, drew from them the following conclusions of law: "That the plaintiff, Thomas Moore, is a purchaser for value of the lands conveyed in mortgages herein referred to; that having no notice at the time of the execution of the mortgages, or at the time of the transfer of the same to him, that any taxes were due thereon, the said lands are not liable for said taxes."

To the report of the referee the defendant filed the following exceptions:

"1. That the referee erred in his first conclusion of law in holding that the plaintiff was a purchaser for value of the lands conveyed in the mortgages set out in the findings of fact from and at the time of the execution of the said mortgages, whereas he should have held that the plaintiff was a purchaser only from the time of the sale of said lands by the commissioner under the foreclosure proceedings set out in the findings of fact.

"2. That the referee erred in his second conclusion of law in that he holds 'that having no notice at the time of the execution of the mortgages, or at time of the transfer of the same to him, that any taxes were due thereon, the said lands are not liable for said taxes, whereas that having found as a fact that on April 9, 1888, the plaintiff had notice that Luby Harper, ex-Sheriff, claimed the unpaid taxes to be due by John Murphy, which is claimed in this action, and having found as a fact that the plaintiff has purchased the property levied upon for said taxes at a judicial sale to foreclose said mortgages since the 9th day of April, 1888, the referee should have held as a conclusion of law that said lands were liable for said taxes and that the injunction be dissolved."

The Act (chapter 391 of Laws 1891) under which the defendant tax-collector is attempting to sell the plaintiff's land for arrears of taxes for the years 1881 to 1886, provides that it "shall not affect purchasers without notice." While it is true that the plaintiff's title to the lands is that made to him since April 9, 1888, by the commissioner who was appointed to sell and make title under an order made in a suit to foreclose certain mortgages, that title, for all purposes of protection to the plaintiff against liens on the land, relates back to the dates of the mortgages. Jones on Mortgages, section 1654. The mortgagees were purchasers for value. *Brem* v. *Lockhart*, 93 N. C., 191, and cases there cited. A purchaser at a foreclosure sale gets the legal title of the mortgagee clear of the equity of the mortgagor. If the mortgagee was a purchaeer for value without notice so must also be the purchaser at the foreclosure sale, the latter having succeeded to all the rights of the former.

It follows that the fact that, after the execution of the mortgages and prior to the foreclosure sale, the plaintiffs had notice that the arrears of taxes on the property, assessed before the existence of the mortgages, had not been paid, cannot have the effect of imposing on the lands in his hands the burden of these taxes, from which burden they had been freed when they were conveyed by the mortgagor to the purchaser for value without notice.

There was no error in the overruling of defendant's exceptions. Affirmed.

SIMEON WOOTEN v. J. T. SUGG, Tax-collector.

Lien for Taxes on Land Mortgaged before Taxes Assessed—Purchaser at Foreclosure Sale Without Notice.

1. It is incumbent on a mortgagee to see to it that the land mortgaged is listed for taxes and that the taxes be paid.
2. Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage.

CIVIL ACTION to restrain the defendant, who was Tax-collector of Greene county, for the collection of arrears of taxes for certain years, from selling land which plaintiff had bought on the foreclosure of a mortgage held by him, heard on exceptions to referee's report before *Bryan, J.*, at Spring Term of GREENE Superior Court.

The facts proved by the referee (F. A. Woodard, Esq.) were substantially as follows:

That on the 3d of April, 1883, William I. Wooten and wife executed to the plaintiff, Simeon Wooten, a mortgage upon one tract of land, situated in Greene county, to secure two notes of $5,000 each, and at a sale made by a commission appointed by the Court in foreclosure proceedings, on December 1, 1891, the plaintiff bought and received a deed for the land; that for the year 1884, the said William I. Wooten being in the possession of said real estate, listed the same for taxation, and the amount of tax assessed against said real estate and other property owned by said William I. Wooten for the year 1884 was $58.17, and that no part of said tax has ever been paid; that at the time of the sale of said real estate by the commissioner, under said decree of foreclosure, the said Simeon Wooten had notice that Sheriff Harper, who was Sheriff in 1884, claimed that the said William I. Wooten owed some back taxes; that the defendant, James T. Sugg, was duly appointed Tax-collector under the Act of the General Assembly of North Carolina, chapter 3 of the Laws of 1891, and levied upon the land described in said mortgage.

Upon the foregoing facts the referee found as conclusions of law that the plaintiff Simeon Wooten was a purchaser for value of the land conveyed in said mortgage; that having no notice at the time of the execution of the mortgage to him that any taxes were due thereon, the said land was not liable for said taxes.

The defendant, J. T. Sugg, Tax-collector, excepted to the report of the referee, upon the ground that the referee erred in his first conclusion of law in holding that the plaintiff, Simeon Wooten, was a purchaser for value of the land conveyed in said mortgage, whereas the referee should have held that the plaintiff was a purchaser of said land from the time of the sale by the commissioner, and not a purchaser from the date of the execution of said mortgage; also that the referee erred in his second conclusion of law in finding "that having no notice at the time of the execution of the mortgage to him that any taxes were due on said land, the plaintiff was not liable for said taxes," whereas he should have held that the taxes claimed by defendant having been levied upon said land since the execution of said mortgage, to-wit, for the year 1884 (see fourth finding of fact), and having found as a fact that the plaintiff had notice of said taxes being due before he purchased the land under the foreclosure sale, he should have held that said lands were liable for said taxes, and should have directed that the injunction be dissolved.

The exceptions were overruled, and defendant appealed.

Mr. T. C. Wooten, for plaintiff.
Mr. George M. Lindsay, for defendant (appellant).

BURWELL, J.: What has been said in *Moore* v. *Sugg*, at this Term, disposes of the defendant's first exception. In the view we take of the matter involved in this appeal that exception is not important here.

There was error in overruling his second exception. The tax which the defendant insists is a burden on the land now owned by the plaintiff was assessed against that property for the year 1884, while the mortgage under foreclosure of which he claims title was made to him in 1893. And while it was undoubtedly the duty of the mortgagor in possession to list the land for taxation and to pay to the proper officer the tax levied on it for each year, it was also incumbent on the mortgagee, the owner of the legal title, to see to it that this was done. It was his property, and the statute (*The Code*, §3700) had provided how he might pay such taxes without loss to himself. Without such a provision it was his privilege as mortgagee to pay the tax and attach the sum so paid to his mortgage debt. Jones on Mortgages, section 1080. The lien of the tax of 1884 on the land was superior to the right either of this mortgagee or mortgagor. And the title of the plaintiff from the commissioner, relating back as it does to the date of the mortgage, cannot relieve the property of this burden of unpaid taxes. The plaintiff when a mortgagee held *cum onere;* as purchaser at the foreclosure sale he holds the land in like plight. This case is clearly distinguishable from *Moore* v. *Sugg, supra.*

The constitutionality of the act authorizing the collection of arrears of taxes, such as that under the provisions of which the defendant is proceeding, has been decided. *Jones* v. *Arrington*, 21 N. C., 125. Upon the facts found it should have been adjudged that the injunction be dissolved.

Reversed.

J. L. WIGGINS v. J. M. KIRKPATRICK et al.

Pleadings—Issues Raised by Pleadings.

1. Where plaintiff, being granted leave to amend his complaint and to reply to the answer and to answer the counter-claim which the latter set up, embodied an amendment to the complaint, a reply and an answer to the counter-claim in a pleading, and the defendant filed no other answer, but an issue was raised by the pleadings, it was error to refuse to submit the issue for the consideration of the jury.
2. In an action on a note the answer averred that if the note was received at all by plaintiff it was "received coupled with and subject to all the equities" between defendant and the payee, and pleaded a counter-claim on account of defective title to the land for which

the note was given; and the amended complaint denied the averment as to the defective title of the land: *Held*, that issues were raised by the pleadings which ought to have been submitted to the jury.

CIVIL ACTION, heard by *Bryan, J.*, at Fall Term, 1893, of LENOIR Superior Court.

The action was upon promissory notes, and defendant, in his answer, averred that the notes were given for the purchase of land which the payee had contracted to convey but had no title thereto. The answer further said that the plaintiff (if he ever received the notes) took the same from the payee "coupled with all the equities between the defendant and the payee," and set up a counter-claim of $200 on account of such defective title. The plaintiff, in the seventh paragraph of his amended complaint as an action to foreclose the bond for title, making new parties, alleged that that part of defendant's answer alleging a defect of title "is not true and the alleged facts in said answer called a counter-claim are not true." No demurrer, plea or answer was filed to the amended complaint, but defendant relied upon the original answer and demanded a trial by jury on the counter-claim. On reading the pleadings the Court gave judgment for the plaintiff, and defendants appealed.

Mr. W. T. Faircloth, for plaintiff.
Mr. H. E. Shaw, for defendants (appellants).

AVERY, J.: Judgment was rendered in favor of the plaintiff on the pleadings for the reason that the defendants had filed "no demurrer, plea or answer" to the "amended complaint." While the method of pleading adopted in this case is not to be commended to the profession for imitation, it must, under the liberal system inaugurated by *The Code*, be tolerated at least. The Court had ordered "that the plaintiff be allowed to amend his complaint and to reply to the answer of the present defendant, J. M. Kirkpatrick, and to answer his counter-claim." Availing himself of the leave thus granted, the plaintiff proceeded to embody in one paper an amendment to his complaint (not an amended complaint) and a reply and answer to the defendant's counter-claim. If, construing together the original complaint, the answer, the amendment and reply, we find that an issue of fact was fairly raised, it was error to refuse to submit the case to a jury. The production of the note was only *prima facie* evidence of ownership, and if the presumption of an assignment for value and before maturity was raised by proof of possession it was not irrebuttable. The defendant, after averring in his answer that if the note had been received at all from Nettles, it "was received coupled with and subject to all equities between this defendant and W. M. Nettles," and pleading a counter-claim of two hundred dollars on account of the defective title to a portion of the land that was the consideration of the note, had a right, even upon this inartistically drawn answer, to demand that an issue involving the question whether the purchase was for value and before maturity be submitted to the jury. If the plaintiff took the note subject to the equities of the original obligor it must have been assigned after maturity, and under the liberal rules of pleading now adopted the language must be construed as tantamount to an averment that the transfer was so late as to subject the note in the hands of the assignee to such equitable defences as would not have been available against a purchaser for value before maturity. *Harris* v. *Sneeden*, 104 N. C., 369. In section seven of the amended pleading the plaintiff aided the original answer, if it was defective, by setting up in reply that the portion of it in which the defendant (in paragraph 3) alleged defect of title was "not true, and that the alleged facts in his said answer, called a counter-claim," were "not true," and by thus raising more explicitly the issue whether there was a defect of title and whether that defence was available, under the circumstances, for the defendant. *Garrett* v. *Trotter*, 65 N. C., 430; *Knowles* v. *Railroad*, 102 N. C., 59; *Johnson* v. *Finch*, 93 N. C., 205.

We think that the answer can be fairly interpreted as a denial that the note was assigned for value, and before maturity, and was not subject to any equities in favor of the maker, and we are of opinion also that a defect in the title is pleaded with sufficient clearness to be comprehended and to put the plaintiff on notice to prepare for the trial of the issues raised.

The Court erred, therefore, in giving judgment for want of an answer, or because "no issue of law or fact was raised by the pleadings." The defendant is entitled to a

New Trial.

THE CLINTON LOAN ASSOCIATION v. J. A. AND T. M. FERRELL.

Partnership—Partner Surety on Note given to the Firm—Statute of Limitations.

The statute of limitations does not begin to run in favor of a member of a partnership who has indorsed the note of an outside party to the firm until the appointment of a receiver to collect the assets or other settlement of the firm's affairs.

CIVIL ACTION, tried at February Term, 1894, of SAMPSON Superior Court, before *Brown, J.*, and a jury.

The notes sued on were all in this form, or substantially so:

"CLINTON, N. C., ----, 187--.

"Ninety days after date we promise to pay A. F. Johnson, Cashier, at the office of the Clinton Loan Association,

------, with interest at eight per cent. per annum from and after date of maturity, for loaned money."

It was admitted that the Clinton Loan Association (joint stock company) was a partnership; that both the defendants, at the time of the execution of the notes, were stockholders therein, and that J. A. Ferrell was a member of the Board of Directors.

It was also admitted that the defendants were sureties on the notes sued on, and that the officers of the Clinton Loan Association knew it at the time of making the loans; and that before the beginning of this action more than three years had elapsed since the maturity of said notes and the last payment thereon.

His Honor held that the fact of suretyship did not change the rule laid down in *Faison* v. *Stewart*, 112 N. C., and that the notes were not barred, and the defendants excepted.

All the facts being admitted, judgment was rendered for plaintiff for the notes without interest, and defendants appealed.

Mr. R. O. Burton, for plaintiff.
Mr. F. R. Cooper, for defendants (appellants).

BURWELL, J.: The contracts which the plaintiff receiver seeks to enforce in this action were made by the defendants with the partnership of which they were members, and related solely to a partnership matter and affected the partnership assets. They contracted that they would be sureties to the firm for the repayment of money loaned by the firm to certain persons. While the partnership continued no suit could be brought by the firm against the defendants, for in such a suit the appellants would necessarily have been both plaintiffs and defendants. Because no suit would lie, the partnership continuing to exist, to enforce the defendants' liability to the firm evidenced by the notes sued on, the statute of limitations would not run in defendants' favor until the appointment of a receiver to collect the assets of the partnership and apply them to the payment of the liabilities of the firm. If that one of the defendants who was a director of the business was allowed by plea of the statute of limitations to escape his liability on these contracts, we would have the singular spectacle of the law allowing the neglect of duty on the part of an agent to work his advantage and the disadvantage of his principal. It is sufficient, however, in this action to say that the plea of the statute of limitations cannot protect the defendants for the reason above stated.

We have examined the following cases, to which we were referred by the counsel for defendants, and do not think that they sustain his contention: In *Carpenter* v. *Greenop*, 74 Mich., 664 (16 Am. St. Rep., 662), it is decided that the indorsee, though after maturity, of a note of a firm payable to one of the firm may maintain an action on it against the firm. In *Stitheimer* v. *Toms*, 114 N. Y., 501, the action was by the assignee of one partner against the firm. *Bull* v. *Cole*, 77 Cal., 54 (11 Am. St. Rep., 235), was a suit by one partner against another to recover a loan which was not a partnership transaction. There it is said: "It is well settled in this State, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions in the absence of a settlement of the accounts." This rule meets any contention of the defendants that the other partners might have sued them on their contract of suretyship, the notes in suit, for they were surely partnership transactions, being between the partners about partnership funds. *Bates* v. *Lane*, 62 Mich., 132, was an action by one partner against another to recover a *personal* debt due by one to the other. In *Conner* v. *Prince*, 12 Am. Dec., 649, which was cited, it is expressly decided that "unless there is a *settlement* and an express promise to pay, one partner cannot maintain an action at law against the other." In *Bonaffe* v. *Fenner*, 14 Minn., 212, the action was brought by the assignee of one partner on a note signed by the other partners and payable to him.

It appears, therefore, that none of the cases cited fit the case under consideration, and that it is in accord with the authorities as well as justice and reason that the defendant partners shall not be allowed by plea of the statute of limitations to escape their liability on these contracts and thus add to the burdens of their copartners in the final settlement of the affairs of this insolvent firm. Affirmed.

M. F. CLOWE v. THE IMPERIAL PINE PRODUCT COMPANY.

Corporation—Scope of General Manager's Authority—Validity of Contract.

1. Section 683 of *The Code* (now repealed), requiring contracts by corporations for more than one hundred dollars to be in writing, applied only to executory and not to executed contracts.
2. A corporation is liable on a contract made by its general manager within the scope of its business.
3. In an action against a corporation for the board of its employees where there was no agreement as to the price or as to the length of time for which board was to be furnished, and extra services were rendered, the amount of compensation was properly left to the jury.

This was a CIVIL ACTION, tried before *Brown, J.*, on appeal from a Magistrate's Court, at the January Term, 1894, of New Hanover Superior Court.

The plaintiff sued the defendant company to recover the sum of $112 alleged to be due the plaintiff by the defendant for the board of two workmen furnished by the plaintiff under an alleged contract with the defendant to pay for the same. The suit was brought to recover on a *quantum meruit* under contract executed.

The contract was denied by the defendant.

Witnesses for the plaintiff testified that they knew L. F. Brown, and knew him to be the superintendent and general manager of the defendant company.

The plaintiff, Mrs. M. F. Clowe, testified that she was a boarding-house keeper, and made a contract with the defendant to board two men. The contract was made with L. F. Brown, who was superintendent of the defendant company, in January, 1893. Mr. Brown came and asked her to board two men for defendant. Contract was not in writing.

Objection by defendant upon the ground that contract was not in writing. Overruled, the plaintiff promising to show the contract had been executed and that she was suing for the value of the service.

Plaintiff, continuing her testimony, said: "Brown said he wanted me to board the men, and that the company would pay their board. He did not know how long they would stay; that they might be here for one, two or three weeks. They stayed each eight weeks, or fifty-six days. No price was agreed upon as to what I should charge. No contract was made as to price. Mr. Brown said that the men must have their breakfast at six o'clock and be ready to get in the sulky of defendant company, which would call for them every morning at a quarter after six. I also agreed to prepare their dinner for them, so that they could take it with them to the company's works, which were beyond the city limits. I got up at four and five o'clock in order to get their breakfast and dinner ready and gave them especial attention. The service was worth one dollar a day for each, making a total of $112. I boarded them each for fifty-six days. The two men were brought out here by defendant from New York to put up retorts. Brown told me the company was to pay their board; that the men were not to pay for it. Brown said he was representing the company."

On cross-examination plaintiff said: "Nothing was said to me by Brown that the defendant company had authorized him to contract a debt for board for these two workmen. About two weeks after the workmen had left I met Brown on Fourth street, some distance from my house, and he asked me if those workmen hadn't left without paying their board. I told him yes. Brown said 'It is all right; you can look to me for the payment of the bill.' Brown never did tell me that the company had ever authorized him to contract debts for board, nor did he say that the company had specially authorized him to say that it would be responsible for it. He said nothing about what his authority was to make the contract with me for the company. I presented the bill to Brown, as he was superintendent of the company, and he refused to pay the same, stating that the bill was too large; that I was only entitled to sixty-four dollars for two months' board each, of the two workmen. My prices for regular boarders are sixteen and twenty dollars per month. I charged these workmen one dollar a day each, as I considered them transient boarders."

There was testimony that the regular prices for transient boarders of private boarding-houses in Wilmington was one dollar per day.

Iredell Meares testified for the plaintiff as follows: "I knew L. F. Brown, and knew him to be the general manager of the defendant company at the time of the alleged contract. I am the attorney of Mrs. Clowe. I instituted suit for her in the magistrate's Court. I presented a bill made out against the defendant company, before the institution of suit, to Mr. L. F. Brown, in the office of the defendant company. Mr. Brown then told me that the defendant company was willing to pay $64, but they refused to pay $112, considering the charge exorbitant. He offered to give me a check for the $64. He did not say that it would be his personal check or the check of the defendant company. Subsequently Mr. McClammy, the defendant's attorney, tendered me $64 in payment of the bill. I do not remember positively whether this was before or after the magistrate's trial. The magistrate gave judgment for $64."

The defendant introduced no testimony.

Before the case was argued the defendant moved to dismiss the case for the following reasons:

"1. That the contract was not reduced to writing, and, it being for a sum exceeding the sum of $100 under the statute, was void.

"2. That from the evidence of the witness upon the stand, the defendant denying the contract as set out by the plaintiff, it was not proven that the company was in any way liable under the contract, but that the contract made was the individual contract of Brown.

"3. That the said contract, if proven, was *ultra vires* of the defendant company, for that the said Brown as agent of said company had no authority, general or special, to make such contract, nor could said company have delegated to said Brown authority to have made the said contract alleged, as the same would have been in contravention of its charter provisions."

His Honor refused to dismiss the action, and submitted to the jury the following issues:

"1. Is the defendant company indebted to the plaintiff for the board and lodging of two men, as alleged by plaintiff?

"2. If so, what is the value of said service?"

The defendat asked the Court to charge the jury, as a matter of law, that if the defendant was liable at all under the contract, it was only liable to the extent of what the plaintiff's regular prices for board were, by the month; that these workmen, having remained for as long a period as two months, were not, in contemplation of law, transient boarders, but regular boarders, and that the law treated them as such.

The Court refused to give the instruction prayed by the defendant, and charged the jury instead that if the evidence of the plaintiff's witnesses was to be believed the defendant company would be liable, and it was for the jury to say, from all the facts and circumstances testified to, what the plaintiff was entitled to recover.

The jury answered the first issue "Yes" and the second issue "$112."

The Court thereupon gave judgment for the plaintiff for $112, with interest and costs, and defendant appealed.

Mr. Iredell Meares, for plaintiff.

Messrs. H. McClammy and *J. D. Bellamy*, for defendant (appellant).

MACRAE, J.: The plaintiff relies upon an executed contract and sues for the reasonable value of her services to defendant in boarding for the time stated two of its employees at the request of its superintendent and general manager. The defendant's first defence is that the contract was not reduced to writing under section 683 of *The Code* (since repealed) and therefore cannot be enforced.

It was held in *Curtis* v. *Piedmont Co.*, 109 N. C., 401, that this statute was applicable to executory and not executed contracts. And this upon the sound doctrine that the defence of *ultra vires* will not avail when the contract itself has been in good faith fully performed by the other party, and the corporation has had the full benefit of the contract. 2 Beach Pr. Cont., section 424.

Upon the second and third grounds of defence that there was no proof that the contract was made on behalf of defendant, nor that, if so made, the general manager had authority to make such contract, we think that in the absence of proof to the contrary in a particular instance, the general scope of the corporate business of a corporation such as defendant would include the board of its employees, and the corporation is always liable on a contract made by its manager and superintendent within such scope. The testimony clearly pointed to the fact that the service was to be performed for the corporation and not the manager.

Indeed, it seems from the testimony that the only real contention of defendant was as to the value of the services. This was submitted to a jury; his Honor was asked to charge the jury that plaintiff could not, under the circumstances, recover more than regular prices for board by the month, not for transient board. As no specified time was agreed upon for which the men were to be taken, and there was testimony of extra services rendered them, it was properly left to the jury to settle the amount the plaintiff was entitled to have, and there is No Error.

THE CITY OF WILMINGTON v. JAMES SPRUNT & SON.

Garnishment—City Taxes—Authority of Collector—Constitutional Law—Exemptions—Earnings of Laborers.

1. Where a city charter provides that the Tax-collector shall have all the powers vested by law in Sheriffs or Tax-collectors for the collection of taxes due the State, such City Tax-collector has the right to collect by garnisheeing any one indebted to a delinquent tax-payer where no tangible property can be found belonging to the latter sufficient to satisfy the taxes.
2. The grant of the same authority to a City Tax-collector as is possessed by a Sheriff in collecting taxes provides for a continual conformity as the general law is from time to time modified; therefore, where a city charter adopted in 1877 gave to its Tax-collector the same powers as to the collection of taxes as Sheriffs had, and the power of the Sheriff to collect by garnishment at that time only extended to poll-taxes but was, by chapter 137, Acts of 1887, enlarged so as to extend to all taxes, the authority of the City Tax-collector was likewise increased.
3. A delinquent tax-payer is not deprived by garnishment proceedings "of due process of law" where he has had legal notice by listing his taxes and an opportunity to have the amount, if erroneous, or the valuation, if excessive, reduced.
4. An objection, if it were tenable, that a delinquent tax-payer (whose wages in the hands of his employer had been attached in garnishment proceedings) had not had his "day in court" could only be raised by the tax-payer himself and not by the garnishee.
5. A tax-list in the hands of the officer to whom it has been delivered for the collection of taxes has the force of a judgment and execution.
6. There is no exemption of any property whatever from the payment of taxes.
7. The exemption of earnings for sixty days allowed to a judgment debtor under section 493 of *The Code* applies only as to proceedings on judgments for private debts and not to taxes.
8. It is in the discretion of the Court whether notice of proceedings for the examination of persons indebted to a judgment debtor shall be given to the debtor.

This was an ACTION begun before a Justice and carried by appeal to the Superior Court of NEW HANOVER County and heard at January Term, 1894, before *Brown, J.* A jury was waived and the action was heard by his Honor, who, upon the evidence submitted, found the following facts:

That Reilly Burnett is a tax-payer of the city of Wilmington and owes poll-tax to said city for the year 1893 in the sum of $2.25; that the defendants are indebted to said Burnett in the sum of $14 money due before the end of the calendar year 1893 for wages as a laborer; that the Tax-collector of said city can find no other property of said Burnett's sufficient to pay said tax; that Owen Fennell, the Tax-collector of said city, served upon the said James Sprunt and W. H. Sprunt the attachment found in the record, to attach any debt due, or that might become due, before the end of the calendar year 1893, by them to said Burnett.

After arguments by counsel the Court gave judgment for the plaintiff, and defendants appealed.

Messrs. Geo. Rountree and *P. B. Manning*, for plaintiff.

Messrs. Junius Davis and *E. S. Martin*, for defendants (appellants).

CLARK, J.. The charter of Wilmington (Acts 1876–'77, chapter 192) provides (section 9): "The officer charged with the duty of collecting taxes shall have all the powers vested by law in Sheriffs or Tax-collectors for the collection of taxes due the State. The Sheriff has the power to collect taxes due the State and county by garnisheeing any one indebted to the delinquent tax-payer when no tangible property of the latter can be found sufficient to satisfy said taxes." Acts 1893, ch. 296, sec. 1. Therefore the collector of city taxes has the same power. *Quod erat demonstrandum.*

The defendants contend that when the city charter was granted in 1876–'77 the Sheriffs had the power to garnishee debts due to the delinquent only for non-payment of poll-taxes. This was extended by Acts 1887, ch. 137, sec. 1, to give the Sheriff the right of garnishment for all taxes. This provision has been continued in all the Revenue Acts since. The grant of the same authority to the City Tax-collector as is possessed by the Sheriff in collecting taxes provides for a continual conformity as the general law is from time to time modified. As was said by SMITH, C. J., in construing an exactly similar provision, "The required conformity of procedure on the part of the town officer to that prescribed for the Sheriff was a continual conformity, allowing any statutory changes made as far as practicable. The mandate is to the officer to pursue the course prescribed for the Sheriff in his office of collector, not only as the law then was, but as it might be amended thereafter." *Hill* v. *Nicholson*, 92 N. C., 24, 28. And this seems to be the uniform rule. 2 Dillon Mun. Corp., sec. 772, and notes; 1 Desty Tax., 475, 476; *Am. Co.* v. *Buffalo*, 20 N. Y., 388.

Nor can it be said that the tax-payer is deprived by the garnishment of "due process of law." He is fixed with legal notice by listing his taxes; he has had opportunity to have the amount, if erroneous, or the valuation, if excessive, reduced. He has had his "day in court." The tax-list in the hands of the officer is a judgment and execution. Acts 1893, ch. 296, sec. 30; *Guilford Co.* v. *Ga. Company*, 112 N. C., 37. Besides, this objection could only have been raised by the delinquent tax-payer for himself by proper proceedings and not by the defendant, who has been duly served with notice as provided by law. There is no exemption of any property whatever from the payment of taxes. Const., Art. 10, sec. 1; *Tucker* v. *Tucker*, 108 N. C., 235. The exemptions allowed to the judgment debtor by *The*

Code, §493, apply only as to proceedings on judgments for private debts and not to taxes. Even in those cases whether notice shall be given the judgment debtor rests "in the discretion" of the Court. *The Code,* §490. No Error.

BOARD OF EDUCATION OF DUPLIN COUNTY v. STATE BOARD OF EDUCATION.

State Board of Education, powers of—Apportionment of School Funds—Writ of Mandamus.

It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools (Const., Art. 9, sec. 2), and while it is the duty of the Board, under Sec. 10 of Article 9 of the Constitution, to make needful rules and regulations concerning the educational fund, it has no power and cannot be compelled by *mandamus* to apportion money raised by taxation in the different counties for school purposes and held in the treasuries of such counties for expenditure according to the apportionment made by the General Assembly.

Application for a *mandamus,* heard before *Brown, J.,* at Chambers in Clinton, Duplin county, at February Term, 1894.

The complaint was as follows:

"1. That the plaintiffs, the Board of Education, and the Board of Commissioners are duly organized bodies of Duplin county, with power to sue and be sued, and Richard W. Millard is the Superintendent of Public Instruction of said county, and James G. Kenan is *ex officio* Treasurer of said county, and that each of the plaintiffs are now in the exercise of their several official duties, and that the defendant, the State Board of Education, is a body politic and corporate under the law of the State, and may sue and be sued by that name; that the defendant Robert M. Furman is Auditor of the State of North Carolina, and the defendant John C. Scarborough is Superintendent of Public Instruction of the State of North Carolina, and that each of the defendants are now exercising the duties of their several offices.

"2. That the defendants, by their rules, regulations and directions, touching the public school system of the State, do now, and have so done for several years, apportion, appropriate and distribute among the several counties of the State the public school fund of the State and counties in a manner and upon a principle contrary to the provisions, intent, and meaning of the Constitution of the State.

"3. That the defendants, by their said rules and regulations, do allow, permit and authorize each county in the State to retain and apply all the public school moneys raised and collected in such county, supplemented by such public school moneys as it derives or receives from the State and other sources, to the use and exclusive benefit of the public schools in such county without regard to the number of school children in such county between the ages of six and twenty-one years in its relation to the other counties and the whole number of such children in the State; whereas the defendants ought to apportion and apply the public school fund of the State and counties among the several counties in proportion to the number of such school children in each county, based upon a *per capita* division and distribution of the public school fund of the State and counties among all the children of the State between the ages of six and twenty-one years.

"4. That the whole number of said school children in the State on June 30, 1892, last report, within the prescribed age was 598,256, and the whole amount of the public school fund received by the County Treasurers for the year ending

June 30, 1892, was $775,449.63, making the *per capita* share of each school child within the prescribed age in the State in said fund equal to one dollar twenty-nine and a half cents and a fraction, and the average length of school terms in the State for the year 1892 was $12\frac{40}{100}$ weeks.

"5. The whole number of school children in Duplin county within the prescribed age on June 30, 1892, last report, was 7,207; and the whole amount of public school fund received by the Treasurer of said county for the year ending June 30, 1892, was $6,373.08, making the *per capita* share of said school children in said county equal to $88\frac{42}{100}$ cents and a fraction, and the average length of the school terms in said county for the year 1892 was seven and one-fourth weeks.

"6. That the whole number of school children in New Hanover county within the prescribed age on June 30, 1892, last report, was 7,867, and the whole amount of public school fund received by the Treasurer of said county for the year ending June 30, 1892, was $27,105.13, making the *per capita* share of said school children in said county equal to three dollars forty-four and a half cents and a fraction.

"7. That the plaintiffs have demanded of the defendants that they apportion and divide the public school fund equally among all the school children of the State within the prescribed age, and that they apportion and appropriate and apply to Duplin county and to each county its share of said school fund in proportion to the number of school children in such county between six and twenty-one years of age, and the defendants refused so to do.

"8. That the defendants seek to justify their refusal in obedience to an act of the Legislature (*The Code*, ch. 15, and amendments thereto), which acts, the plaintiffs allege, so far as they bear upon the contention in this action, are unconstitutional and void."

Wherefore the plaintiffs pray judgment:

"1. That the defendants show cause at the time and place designated in the summons why a peremptory order shall not be made by the Court directing that they apportion and divide the public school fund of the State *per capita* among all the school children of the State between the ages of six and twenty-one years, and that they apportion, appropriate and apply to Duplin county and to each county in the State its share of said fund in proportion to the number of said school children in such counties within the prescribed age.

"2. That such peremptory order be made.

"3. That chapter 15, Vol. II of *The Code*, and amendments thereto, authorizing a division or appropriation of the public school fund otherwise than upon a *per capita* basis among all the said school children of the State, be declared void.

"4. That such orders and decrees as may be deemed necessary and proper be made, and that plaintiffs recover their costs in this action."

The answer was as follows:

"1. That the first paragraph of the complaint is admitted.

"2. That the second paragraph of the complaint is denied.

"3. That the third paragraph of the complaint is denied. It is admitted that the tax levied by the General Assembly for the support of the public schools of the State is collected in the several counties of the State and apportioned and used in the counties in which the same is paid, but it is denied that this is done under the authority of the defendants or either of them, or under any rule, regulation or ruling of the defendants. On the contrary, the defendants allege that said tax for public schools is so collected and apportioned under an act of the General Assembly, and that neither of the defendants has the control, custody or management of said taxes.

"4. That the fourth, fifth and sixth paragraphs of the complaint are admitted.

"5. That the seventh paragraph of the complaint is denied, and the defendants allege in connection therewith that no part of said school fund is in the possession or control of either of the defendants.

"6. That the eighth paragraph of the complaint is denied. The defendants do not act in the premises because they have no fund under their control to apportion, and the General Assembly has given them no authority to interfere with the collection, disposition and apportionment of the school fund collected and disbursed in the several counties."

It was admitted, for the purposes of the trial, that the demand and refusal had been made as alleged in the complaint. After hearing argument the Court, being of opinion against the plaintiff, refused the writ prayed for, and adjudged that the defendants go without day and recover costs, and plaintiff appealed.

Mr. W. T. Faircloth, for plaintiff (appellant).
Messrs. Allen & Dortch and *Busbee & Busbee*, for defendant.

MACRAE, J.: The State Board of Education by virtue of section 10, Article 9 of the Constitution, "shall succeed to all the powers and trusts of the president and directors of the literary fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the Board." The powers and duties of the president and directors of the literary fund are fully set forth in chapter 66 of the Revised Code of 1854. The "literary fund" embraced the swamp lands of the State and a large amount of shares of bank stock, stock in railroad companies, dividends accruing upon certain navigation and canal company stock, the proceeds of certain taxes upon licenses, moneys paid for entries of vacant lands, certain bonds due and owing by railroad companies, individuals, corporations and the State. These or the income thereof were vested in the president and directors of the literary fund, to which corporation large powers were granted for its administration, and its net income was required to be annually distributed among the several counties of the State in the ratio of their Federal population, and paid over to the chairmen of the County Boards of Education. This large and extremely valuable fund, set apart many years ago for the education of the youth of the State, has no longer an existence, except as to that portion of the swamp lands which has not been disposed of, and about $150,000 of State bonds bearing four per cent. interest, and $27,000 otherwise invested. It will readily be seen that the income arising from this permanent fund, even if there were no expenses of the educational department to be paid out of it, would go a very little way toward the keeping up of the public schools. The sum necessary for this purpose has now to be raised annually by taxation upon polls and property, and from fines and forfeitures and other resources named in section 5 of Article 9 of the Constitution, comprising the county school funds.

There was no provision of law for the apportionment by the president and directors of the literary fund of any except the net annual income of the literary fund as stated above. The Courts of Pleas and Quarter Sessions were required by law to levy an annual tax for school purposes, which was collected in each county and paid over to the chairman of the County Superintendents. By the present system, ch. 15, Vol. II of *The Code*, as amended from time to time, the State Board of Education, succeeding to the powers of the president and directors of the literary fund, are not to make investments of the funds coming into their hands, but are required on the first Monday in August of every year to apportion, on the basis of school population, among the several counties of the State all the school funds which may then be in their treasury. *The Code*, §2535.

The plaintiff's complaint is to the effect that the State Board of Education, by their rules and regulations, do allow, permit and authorize each county to retain all the public school money raised within that county, and apply it, with such funds as are received from the State and other sources, exclusively to the support of the schools in said county; and it is alleged that this is at variance with the constitutional requirement that there shall be provided by the General Assembly "a general and uniform system of public schools in the State." The plaintiff seeks to require the State Board of Education to apportion and divide the public school fund of the State *per capita* among all the school children of the State, especially those of Duplin county. The defendant denies that it has any of the school funds in its treasury, or that it is its duty to make the apportionment of the school fund, and it avers that the General Assembly has by appropriate legislation provided the necessary means to be raised by taxation in the several counties and there apportioned and used.

It was stated by the learned counsel for the plaintiff upon the argument that the main question intended to be presented is whether the school children are entitled to an equal distribution *per capita* of the school fund; an interpretation of the 9th Article of the Constitution that all of the fund raised in the State for common school purposes should be distributed *per capita* among the beneficiaries and not be retained in the counties where it is raised, and there expended. And in order to raise this question the plaintiff demands that a *mandamus* issue to the State Board of Education requiring it to make an apportionment and division of all the educational funds under its control, *per capita*, among the school children of the State, and apportion to each county its share of said fund in proportion to the said number of school children.

We see nothing in the Constitution which imposes upon the defendant the duty of apportioning the money raised by taxation for the support of the public schools; it is the General Assembly and not the State Board of Education which is required to establish a uniform system of public schools. Art. 9, sec. 2. The funds coming into the treasury of the State Board of Education, and which it is required to apportion, are a very small portion of the money to be expended for the support of the schools. The needful rules and regulations which it may make concerning the educational fund do not extend to the apportionment of that which has already been apportioned by act of Assembly.

The writ of *mandamus*, once called a high prerogative writ, will never be issued except where its propriety is plain and beyond doubt. If there were funds in the treasury of defendant which it ought to apportion among the counties according to law, and which it refused so to appropriate, the remedy here invoked would be the proper one; but in the absence of any allegation to that effect, and in the absence of any provision in the Constitution or in the statutes requiring the defendant to make the apportionment of the money raised by taxes in the different counties and retained in their several treasuries, the defendant cannot be compelled to do that which is not required of it by law.

We do not feel at liberty to consider any abstract question involving the construction of the Constitution not necessary to be decided in the disposition of the matter before us. Judgment Affirmed.

JUNIUS DAVIS, Receiver of Bank of New Hanover, v. THE INDUSTRIAL MANUFACTURING COMPANY et al.

Banks—Receivers—Insolvent Corporation—Action in Receiver's Name—Creditors and Debtors—Set-offs—Deposits in Insolvent Bank.

1. One, to whom an insolvent bank made an assignment of its assets and who on the same day and at the suit of creditors was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment but as an officer of the Court appointed to settle and wind up the affairs of such insolvent bank.
2. Under section 668 of *The Code* a receiver of an insolvent corporation may sue either in his own name or in the name of the corporation, and in such suit all the rights of the parties, both legal and equitable, pertaining to the matters set out in the pleadings, may be adjudicated.
3. While in the statutes relating to the winding up of the affairs of an insolvent corporation no specific directions are given as to mutual debts and credits, yet under sections 669 and 670 of *The Code*, which provide that the Court shall make such orders as justice and equity shall require and direct how claims shall be approved, the claims of an insolvent bank and its debtor, who is also a depositor, may be adjusted.
4. Debtors to an insolvent bank are those who, at the appointment of a receiver, are liable to the bank for the payment of money, whether as principal or surety or whether the liability be matured or not; and creditors are those to whom the bank is indebted at the date of the appointment of the receiver, whether the debts are due or not.

5. After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver's right to set-off claims the bank may have against the creditor, and if the assignee of the claim is himself a debtor of the bank he cannot use the assigned claim as a set-off.
6. The effect of the insolvency of a bank closing its doors and stopping its business is to make all its deposit accounts and certificates of deposits at once become due without demand or notice, and in settling its affairs equity and justice require that the receiver shall deduct from the amount due a creditor all sums for which he is a debtor and shall allow a debtor credit for all sums for which he is creditor.
7. Where one of several indorsers of a note of an insolvent debtor to an insolvent bank is also a creditor of such bank he is entitled to avail himself of his claim in settlement of his proportionate part of his liability on such note, which will be less or greater according to the solvency or insolvency of the other indorsers.

This was a CIVIL ACTION, tried at January Term, 1893, of NEW HANOVER Superior Court, before *Brown, J.*

It was agreed that the Court find the facts, a jury trial being waived and entered of record. The Court found the following facts:

"The plaintiff is the assignee of the Bank of New Hanover, a banking corporation which did business in the city of Wilmington. Said assignment was made June 19, 1893. On same day the plaintiff was appointed receiver of said bank and of the assets of said bank so assigned to him. The plaintiff was also appointed receiver again July 12, 1892, in suit of Tate, Treasurer. Among other assets assigned to plaintiff for the purpose of paying the debts of said bank is the note sued on, a copy of which is as follows:

"$6,000. WILMINGTON, N. C., May 23, 1892.

"Two months after date, without grace, for value received, I promise to pay to the order of the Bank of New Hanover six thousand dollars, negotiable and payable at the Bank of New Hanover; and upon default in making such payment promise to pay interest on such sum at the rate of eight per cent. per annum during the continuance of said default.

"(Signed) THE INDUSTRIAL MANUFACTURING CO.

"Said note is indorsed by said J. D. Bellamy, Jr., and each of said defendants on its back.

"The defendants J. D. Bellamy, Jr., and Henry P. West plead set-off as follows, and the following facts are found:

"At date of said assignment the bank was indebted to John D. Bellamy, Jr., for legal services in the sum of ten dollars. Also $112.10 on deposit in said bank to sight check. Also a certificate of deposit as follows:

"$1,150. BANK OF NEW HANOVER,
"WILMINGTON, N. C., January 16, 1893.

"John D. Bellamy, Jr., has deposited in this bank $1,150, payable to the order of himself after thirty days' notice on the return of the certificate properly indorsed, with interest at the rate of five per cent. per annum if left for three months. (Signed) W. L. SMITH,
"*Cashier.*

"Notice was given on this certificate June 6, 1893.

"Said Bellamy holds a certificate entirely similar to above for $1,000, indorsed to him by Mrs. M. A. Dosher, May 22, 1893. Notice was given, and said certificate was due and payable June 23, 1893. This certificate bears on its face four per cent. interest, and dated April 29, 1893.

"Henry P. West holds a certificate similar to the above, bearing date, four per cent. interest, payable to himself, for $1,020.26, dated May 13, 1892. No notice was given by West to the bank or to assignee Davis until thirty days before suit commenced. This notice was given after assignment.

"Henry P. West had also deposit in said bank at date of its assignment of $1,100, subject to check. H. P. West does business under the firm name and style, and is sole member of the concern.

"J. D. Bellamy, Jr., testified as follows (the facts stated by him are found true and so adjudged):

"'I owned $\frac{53}{175}$ of defendant manufacturing company property. Bates, president of bank, stated to me the note sued on must be paid. I stated that we would arrange it. I also stated that I did not like to have money on deposit in the bank at four per cent. interest, and be paying eight per cent. He then agreed to allow me five per cent. on the certificate dated January 16, 1893, and changed the word 'four' to 'five.' There was no agreement that the money I had on deposit was to be applied to payment of note sued on and no such dedication of it. There is a thirty days' clause in the four per cent. and five per cent. certificates, but the bank never enforced the notice for many years up to May 23, 1893. It was enforced after that. On June 6, 1893, the cashier paid me a $1,000 certificate without exacting notice. At the same time he declined to pay the $1,150 certificate without notice. I requested payment of the $1,150 certificate that day. The cashier said he could not pay it without the notice.'

"W. L. Smith, cashier of said bank, testified (the facts testified to by him are adjudged to be true):

"'The Bank of New Hanover issued four per cent. certificates of deposit (similar to one copied). The thirty days' notice was not required, and was generally waived up to May 23, 1893. After that it was exacted almost invariably, except as to certificates in sums of $100 and less. I paid a $1,000 certificate to J. D. Bellamy, Jr., waiving notice after that date, but did not pay the $1,150. I don't recollect that it was presented.'

"It is admitted that all of said certificates were due at date this action was brought.

"In the argument defendant's counsel admits that the matters pleaded do not constitute a counter-claim, as no judgment can be rendered thereon against the plaintiff Davis.

"It is claimed that the obligations of the bank to the defendants Bellamy and West constitute a set-off against the note sued on. No defence or set-off is pleaded by the other defendants. They join in the plea of their co-defendants."

From the above facts the Court concluded, as a matter of law:

"1. That the certificates of deposit were not due on June 19, 1893, when note sued on was assigned to plaintiff Davis, and do not constitute a set-off against said note.

"2. That J. D. Bellamy, Jr., and Henry P. West cannot plead their individual demands against the bank as set-offs against the note sued on.

"3. That the other defendants cannot plead the set-off claimed only by their co-defendants Bellamy and West. Let judgment be entered for plaintiff."

From this judgment the defendant appealed.

Mr. George Rountree, for plaintiff.

Mr. J. D. Bellamy, Jr., for defendant (appellant).

BURWELL, J.: The plaintiff is the receiver of a banking corporation, the insolvency of which is alleged. Immediately before his appointment as such receiver the bank made to him a general assignment of all its property for the benefit of its creditors. In the proceedings instituted to effect a winding up of its affairs, in which, as stated above, the plaintiff was appointed receiver, it was adjudged that that assignment was "in contravention of the laws of North Carolina in such cases made and provided." By that adjudication, as seems conceded, his title to the assets as assignee was destroyed and thereafter he held them merely in his capacity as receiver. These proceedings were instituted and this appointment was made on June 19, 1893, in the Superior Court of New Hanover County. It appears from the record that on July 11, 1893, the plaintiff was again appointed receiver of the bank in a proceeding instituted in the Superior Court of Wake County by the Public Treasurer under the provision of chapter 155 of the Laws of 1891, which in certain contingencies directs him to take such action "for the purpose of winding up and settling the affairs" of a bank incorporated by the laws of this State.

In our consideration of the questions presented by this appeal we will assume that the latter proceedings are in aid of the proceedings instituted by the creditors in the Court of New Hanover County, and that the plaintiff has been continuously and uninterruptedly the receiver of the Bank of New Hanover from June 19, 1893, the date of his first appointment.

It is to be borne in mind, then, that he is not the assignee of an insolvent, empowered to collect and distribute the assets of his assignor according to the terms of the deed of assignment, so far as its provisions are not inconsistent with the law. He is an officer of the Court, appointed to "settle and wind up" the affairs of the insolvent bank, and to that end is invested *sub modo* with the title to the bank's assets, and is authorized by statute (*The Code*, §668) to bring suits to collect debts due to it, either in his own name or in the name of the corporation. Prior to the enactment of this statute and the merging of the courts of law and the courts of equity into one tribunal having jurisdiction of both legal and equitable rights, a receiver, appointed by a court of equity and holding the relation that plaintiff holds to the corporation, its assets and its debtors and creditors, could not maintain in his own name a suit on a note due to the bank and in his hands as receiver. *Battle* v. *Davis*, 66 N. C., 252. In *Gray* v. *Lewis*, 94 N. C., 392, it was decided that, as well because of the change in the system of our courts as because of the statute, the receiver might sue either in his own name or that of the insolvent corporation. In whichever name he may elect to bring the action it is essentially a suit by the corporation, prosecuted by order of the Court for the collection of the assets, and the rights of the defendant cannot be altered or destroyed by his choice to sue in his own name rather than in that of the bank. In it may be adjudicated all the rights of the bank, its creditors and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such a judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendants, jointly or severally, may be entitled to by reason of their being depositors in the bank as well as debtors thereto.

In the statutes of this State which relate to the winding up of the affairs of insolvent corporations there is no specific direction as to mutual debts and credits. It is said, however, that in the proceedings there shall be made such "orders, injunctions and decrees as justice and equity shall require" (*The Code*, §669), and that the Court shall direct the manner in which debts against the corporation shall be proved. *The Code*, §670. In the settlement of the estates of insolvents it is necessary that there should be some general rule by which it may be determined what is the provable debt in cases where the creditor is also a debtor to it, either as principal or surety. That rule must be such as equity and justice require, and, when made, must control the demands of the receiver in such cases as that which we now have under consideration; for, if from the claims of an insolvent creditor of the bank he shall be allowed to demand a deduction, before proof, of whatever the claiming creditor owes the bank, no matter whether as principal, or partner, or surety, or guarantor, and to allow a dividend only on the net amount after such deduction, equity and justice will require that the same principle shall be applied when, as here, the receiver seeks not to avoid the payment of an excessive dividend, but to collect a debt due to the insolvent bank, and the debtor asks that the Court's officer (the receiver) will require him to pay, not the gross sum that he owes as principal, or partner, or surety, or guarantor, but the net amount after deducting from all the demands against him of whatever nature the sum due to him from the bank.

It may be well here to note precisely who are meant by debtors and creditors of the insolvent bank, as the terms are used in this discussion of the rules of equity that should control the settlement of its affairs. By debtors to the bank are meant all those who, at the appointment of the receiver, were liable to the bank for the payment of money, whether their liability had matured or not, and without any regard to the exact nature of the liability, whether as principal or surety. The word, as here used, does not include those who become indebted to the receiver, for the same reason that a person who has become indebted to an administrator of an insolvent estate is not considered a debtor to the intestate, and allowed to set up against that debt a debt due from the deceased to him. He owes the *administrator*, while the *estate* owes him. *Pate* v. *Oliver*, 104 N. C., 458; *Roun-*

tree v. *Britt*, 94 N. C., 104; *Mauney* v. *Ingram*, 78 N. C., 96. Nor is it intended to include stockholders or officers of the corporation against whom the receiver may be directed to bring actions to recover sums due for subscriptions for stock, or other like claims. In all matters pertaining to set-off such indebtedness or liability as that last named is considered as due strictly to the receiver and not to the corporation.

By creditors of the bank are meant those to whom the bank was indebted at the date of the appointment of the receiver, whether the debts were then due or not. The creditor may thereafter assign his claim, but the assignee will hold it subject to the receiver's right to set-off against it claims he holds against the creditor, as stated heretofore. If the assignee of the claim is himself a debtor to the bank, he will not be allowed to use the assigned claim as a set-off. *Brown* v. *Brittain*, 84 N. C., 552.

Having thus stated what we here mean by debtors and creditors of the bank, we declare that in our opinion equity and justice require that the receiver, when he comes to make a settlement with one who is a creditor of the bank, shall deduct from his credit all those sums for which he is debtor, and when he settles with a debtor to the bank he shall allow him credit for all sums for which he is a creditor of the bank.

Applying this rule to the case now before us, we find that the defendant Henry P. West is a creditor of the bank in two accounts: First, by a deposit subject to check, and second, by a certificate of deposit bearing interest at four per cent, dated May 13, 1892, "payable to the order of himself after thirty days' notice on return of this certificate properly indorsed." To the extent of these two deposits he is a creditor. In a certain sense he may be said to be a debtor to the bank for the whole amount of the note on which he is one of the eight indorsers. If it is true that the principal debtor, The Industrial Manufacturing Co., is wholly insolvent, and that the receiver will not be able to collect anything on this note from it, then the true debt of the defendant West to the bank is one-eighth part of the whole amount and also his proper proportion of what his co-sureties fail to pay and cannot be made by execution to pay; and we hold that the receiver should be directed to adjust and settle the said true indebtedness of the defendant West by setting off the same against his aforesaid claims against the bank.

It is to be assumed that the receiver, when an execution is issued in his favor, will direct the Sheriff in such cases as this one to seize and sell the property of the principal debtor, and not direct steps to be taken against the sureties unless necessary, and against the sureties only as is equitable and just.

In Morse on Banks and Banking, section 338, it is said: "Where the bank itself stops payment and becomes insolvent the customer may avail himself in set-off against his indebtedness to the bank of any indebtedness of the bank to himself; as, for example, the balance due him on his deposit account. So, also, even though the debt to him has not matured at the time of the insolvency. The maker or indorser of a note falling due after insolvency may set off his deposit, or a debt due him at the time of the assignment, but not a claim coming to him after the assignment." By the expression "coming to him after assignment" is meant purchased or otherwise acquired after the assignment, the principle announced being that decided by this Court in *Brown* v. *Brittain, supra.*

In the settlement of the affairs of an insolvent national bank the indorser of a note in the hands of the receiver was allowed to set off against his liability on this note his deposits in the bank. *Yardley* v. *Clothier*, 51 Federal Rep., 506, overruling *Armstrong* v. *Scott*, 36 Fed. Rep., 63. If an indorser has this right of set-off any one or more of several indorsers must certainly have the same right. The National Banking Act contains no express provision as to set-off in cases of insolvency of a bank. In the matter of the Middle District Bank, 9 Cow., 414, Chancellor WALWORTH said: "If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to set off bills which he had at the time the bank stopped payment. But no such effect should be allowed to an indorser where he is indemnified by the real debtor, or where the latter can be compelled to pay." The rule thus stated by the learned Chancellor seems to us eminently just and equitable. It was applied by him to the settlement of the affairs of a bank of issue. The Bank of New Hanover was not a bank of issue, but of deposit and discount. But we know of no reason why it should not effect an equitable result as well where the indebtedness of the insolvent bank consists of accounts and certificates of deposit as where its liabilities were represented by bills. If it be said that no action would lie on the deposit which was subject to check until after demand and refusal it is to be replied that the same is true of an action on bills of a bank of issue. But we think that the effect of the insolvency of the bank and its closing of its doors and stoppage of business, and attempting to assign all its property to the plaintiff, was to make all its deposit accounts and all its certficates of deposit at once due without any demand or notice. *Seymour* v. *Durham*, 31 Hun., 93, was an action by the assignee of an insolvent bank against the maker of a note, who asked that he be allowed to set off a certificate of deposit payable to his order "on return of the certificate properly indorsed, with interest at the rate of five per cent., if left four months." We adopt as pertinent here what was said there: "The argument of the plaintiff is that such a deposit is not due until demand; that, as no demand has been made before the assignment, the deposit was not then due; while the note was due, and therefore that the deposit is not a set-off. There is no doubt of the general principle that an action cannot be maintained for money thus deposited until after demand. And the reason for that is that a right of action does not arise until there has been a breach of contract. And in cases of such a deposit a breach of contract does not take place until a refusal of payment. But the plaintiffs, as I think, err in arguing that, because a demand is necessary before an action can be brought, therefore the indebtedness is not presently payable. The depositary may lawfully pay the debt at any time. He could not do this if it were a debt payable in the future. The depositor may lawfully demand the debt at any time. He could not do this if it were a debt payable in the future. A debt payable in the future is one which neither the debtor has a right to pay nor the creditor has a right to demand *instantly*. That is not the case with such a deposit. There is no future day till which the respective rights of the parties are postponed. The creditor may demand payment at any time, and therefore the deposit is a debt payable *in presenti*. Let us suppose that Pratt (the banker) instead of making an assignment had sued Dunham (the debtor) on the past due note. Can it be doubted that Dunham might have set off in such action the deposit, producing and surrendering the certificate? Could Pratt (the banker) have objected in opposition to such a set-off that Dunham had not made a demand for the deposited money before the day when Pratt commenced his action? The reply to such an objection would have been that a demand was only for the depositary's protection, when called upon to pay, but that no demand was needed when the deposit was to be used only as a set-off or defence."

The fact that in one case the certificate of deposit was payable "after thirty days' notice" and not immediately after demand cannot make the language above quoted inapplicable here. But besides all this it must be considered that when a bank of deposit closes its doors and abdicates its functions, as the Bank of New Hanover did, all its deposits, whether evidenced by book accounts, or certificates such as the defendant West holds, became *eo instanti* due. Why demand that which it had thus emphatically declared it could not and would not pay? Why notify the insolvent bank that after thirty days a demand would be made? On whom should the demand be made? To whom should the notice be given? The law does not require the doing of "vain things." The failure to do them is not allowed to prevent the enforcement of just rights.

We do not think that the principle announced in *Adams* v. *Bank*, 113 N. C., 332, cited by plaintiff's counsel, has application here. We are not considering the lien of a bank upon the deposit of its customer, but the rights of a depositor in an insolvent bank that has stopped business to treat his deposit as due and to demand that there shall be an accounting, and that the difference between all the debits and all the credits shall be considered by the receiver, the officer of a court of equity, as the true debt due from him to the bank.

It is not necessary here to discuss the legal rules which are adopted by the Courts when the defendants in an action seek to enforce a claim which they or some of them have against the plaintiffs, or some of them, further than to say that if the Bank of New Hanover, not being insolvent and in the hands of a receiver, had itself brought this action, we can see no reason why each one of the defendant depositors should not be allowed to set up against the claim of the bank what the bank owed him either on account or by certificate. The objection of the bank to such an allowance of credit would seem most unreasonable and to indicate a purpose not to conduct its business as solvent banks do. Such an objection would not be raised by a solvent banking institution. No objection would be likely to come from the principal debtor or the other sureties. If it did come from either the reply would be: Pay all the debt then yourselves if you do not wish to account with your co-defendant after he has paid it by surrendering his own individual bank deposit. There would be no such multiplicity of issues raised as would make it inconvenient or impracticable to try all of them in one action. The tendency of *The Code* practice is towards the enlargement of the number of rights that may be adjusted in one action. *Sloan* v. *McDowell*, 71 N. C., 356. The Court, being a court of equity as well as of law, adjusts its judgment or decree to enforce and protect all the rights of all the parties, and each right of each party, as far as they can be declared upon the pleadings, issues and verdict. *Clark* v. *Williams*, 70 N. C., 679; *McNeill* v. *Hodges*, 105 N. C., 52.

What is said above applies also to the deposit account and the certificates of deposit set up by the defendant Bellamy. His claim for services was due from the bank to him before its insolvency, and must be counted as a part of the set-off available to him in settlement of the claim of the bank against him.

We hold, therefore, as we have heretofore stated, that while the judgment against all the defendants for the amount of the note and costs was proper it should have been so framed as to contain a direction to the receiver to allow the defendants West and Bellamy to avail themselves of their respective claims against the bank, set out in the answer, in settlement of what each of them is required to pay to satisfy this judgment. If the principal debtor is wholly insolvent and the receiver can get nothing by his execution against it, and all the co-sureties are solvent, then, as has been said, each of these defendants will be allowed to pay one-eighth part of the judgment in that way. If any one or more of the sureties are insolvent the proportion of the judgment to be adjusted in this way by these two depositors, West and Bellamy, will be increased. The receiver should be directed to proceed in the collection of his judgment in accordance with the principle herein announced, and to allow the set-off of the defendants West and Bellamy to the extent indicated above.

Modified and Affirmed.

UNITED STATES NATIONAL BANK OF NEW YORK v. McNAIR & PEARSALL.

Banks—Negotiable Note—Bona Fide Purchaser.

Plaintiff bank rediscounted for N. Bank, along with other notes, a note of the defendants (against which the latter claimed an equity) and placed the proceeds to the credit of N. Bank, and before receiving notice of the equity paid checks of N. Bank to the extent of half of the proceeds of such rediscount: *Held*, that plaintiff was a purchaser of such note for value, although between the date of such rediscount and notice of the equity plaintiff had credited other items to N. Bank and at time of such notice owed the latter more than the proceeds of the rediscount.

This was a civil action, tried before *Brown, J.*, and a jury, at January Term, 1894, of the Superior Court of New Hanover.

The plaintiff, the United States National Bank of New York, brought its action against the defendants to recover the sum of $5,000 due by the defendants to it on a promissory note which the defendants, McNair & Pearsall, under date of November 19, 1891, had executed to the First National Bank of Wilmington, N. C., for the sum of $5,000, and payable thirty days after its date, and which said note the said First National Bank of Wilmington had indorsed to the plaintiff for value and before maturity, as plaintiff alleges.

The defendants, McNair & Pearsall, by their answer admitted that the said note had been indorsed before maturity to the plaintiff, but denied, on information and belief, that the plaintiff was a purchaser for value of the note in controversy; and further alleged as a defence a set-off and counter claim, as appears by the answer of the said defendants.

The plaintiff filed a replication to the said answer, as appears by the record.

The following issues were submitted to the jury:

"1. Is the plaintiff a purchaser for value of the note sued on without notice? Answer, No, not a purchaser for value.

"3. What sum, if any, are defendants entitled to recover by way of counter-claim against cause of action sued on? Answer, $4,199.89."

The defendants introduced as a witness in their behalf A. K. Walker, who testified as follows: "I was corresponding clerk of the First National Bank of Wilmington for some months prior to its suspension. The bank suspended on November 25, 1891. I remember the note given by the defendants to the United States National Bank of New York. Several other notes were sent at the same date, and all were indorsed to plaintiff before they were due. The notes sent in the batch with the note in controversy amounted to $17,000, and none of these had matured. These notes were discounted for the First National Bank of Wilmington by the plaintiff. The First National Bank of Wilmington did business on the 24th day of November, 1891, but did not open its doors on the 25th day of November, 1891."

The defendants' counsel handed a paper to the witness, who stated that the paper is the account current with the United States National Bank.

"The amount of $16,911.33 under date of November 23d on this account is the proceeds of the $17,000 worth of notes which were rediscounted by the said plaintiff bank for the First National Bank, and appears on the account as of the date of 23d November, 1891, and is the last entry on the account as to its position. The amount was placed to the credit of the First National Bank and subject to its sight draft. This account is in the same handwriting as nearly all previous monthly accounts, and came by mail from the plaintiff bank in an envelope stamped 'United States National Bank.' The account runs from November 1, 1891, to November 30, 1891, and the said account, being an exact copy of all of the debits and credits from the 1st day of November to the 30th day of November, 1891, both inclusive, is made a part of this evidence, and marked Exhibit 'A.'" The plaintiff objects to the introduction of this account. Objection overruled. Plaintiff excepts.

"The $17,000 worth of notes, which includes the note in controversy, were sent on November 21, 1891, to plaintiff for rediscount. The United States National Bank was the New York correspondent of the First National Bank and its bank of deposit in New York. The notes amounting to

$17,000, among which was included the note sued on, were sent to plaintiff indorsed by the First National Bank on the 21st day of November, 1891, and I sent them myself that day. They left here the night of the 21st by mail and were the last batch of notes sent by First National Bank before its failure to the United States National Bank, and in the course of mail they reached New York on the morning of November 23d and were discounted and placed to the credit of the First National Bank on that day.

"According to the account which has been introduced, at the close of the account, the balance due the First National Bank on the said account is $21,279.33." The plaintiff objects to any testimony as to the balance due the First National Bank of Wilmington by the plaintiff bank on any day between the 21st day of November, 1891, and the 30th day of November, 1891. Objection overruled. Plaintiff excepts.

"On the 21st day of November, 1891, the balance due the First National is $43,387.02; on November 23d, $28,338.75; on November 24th, $17,586.44; on November 26th, $21,640.51; on November 27th, $21,236.04; on November 28th, $21,370.78. There were quite a number of First National Bank checks that were not paid by the First National Bank, but none were refused payment up to the time that the First National Bank suspended."

On cross-examination the witness testified that these accounts current are made out in rough and sent out for the purpose of ascertaining errors.

"The plaintiff bank was our regular New York correspondent, and at the date the plaintiff discounted the defendants' note for the First National Bank plaintiff's bank held a large amount indorsed by the First National Bank which the First National Bank had received money on and all of which had been passed to the credit of the First National Bank.

"At the time of the suspension of the First National Bank and up to the 1st of December, when account current was rendered, none of the paper rediscounted by the plaintiff for the First National Bank had become due. I am now satisfied that the plaintiff bank held $48,500 worth of paper and notes indorsed by the First National Bank, including the $17,000 sent on the 21st day of November. All of this had been placed to the credit of the First National Bank before it failed. At the close of business on the 24th day of November, 1891, the defendants had on deposit the sum of $4,199.89 in the First National Bank."

The plaintiff introduced the depositions of J. H. Parker, H. C. Hopkins and J. J. McAuliffe.

This is all the evidence introduced by either party at the trial, and there was no other evidence as to the discounted paper held by plaintiff, nor as to how much of it had been collected.

The Court charged the jury as follows:

"This is an action brought by plaintiff to recover on a note for $5,000 set out in the complaint. This note, it is admitted, was payable to the First National Bank of Wilmington and indorsed by it to plaintiff and discounted by plaintiff on the 23d of November, 1891. It is admitted that said note with others amounting in all to $17,000 were mailed to plaintiff on November 21, 1891, and discounted by plaintiff on 23d; and on that date the proceeds were placed to the credit of the First National Bank on the books of plaintiff, to-wit, $16,911.33.

"It is admitted that at the time said note was discounted and proceeds placed to the credit of the First National Bank the defendants had on deposit in latter bank $4,199.89.

and that said sum was still due defendants by said First National Bank when it suspended on November 25, 1891; and that it has never been paid. There is no evidence that plaintiff had notice of this deposit.

"An account rendered by plaintiff to First National Bank is in evidence. It is not denied that this identical account was rendered by plaintiff to said First National Bank.

"On said account it appears that the First National Bank was credited November 23, 1891, with an item of discount, $16,911.33. It is not denied that this item is composed of the batch of papers aggregating $17,000, and that defendants' note for $5,000 was one of the notes discounted and composing that item. It appears on the account that the only other items received by plaintiff and credited said First National Bank after the 23d and after the entry upon said account of the $16,911.33 item was one upon the 24th of $3,167.21; one upon 25th of $7,161.74; one upon 25th of $1,992.33; one upon 30th of November of $30, and one same date $110.89. The account then closes, showing balance due First National Bank of $21,279.33. This shows that the proceeds of the discount of defendants' note, although credited on plaintiff's books, has never been paid out by plaintiff.

"The evidence shows that plaintiff held a large amount of paper indorsed by First National that had not then matured. There is no evidence that plaintiff has failed to collect any of such paper except the notes sued on.

"Upon this state of facts and upon the entire evidence the Court is of the opinion that you should answer first issue, 'No.'

"The Court is of the opinion that defendants may plead their deposit in First National Bank as a set-off and counter-claim against their note sued on—there being no evidence that the plaintiff has paid the said money to the receiver.

"It is admitted that plaintiff received defendants' letter and also the telegram in evidence.

"You should also, upon the undisputed evidence not denied, answer second issue, '$4,199.89.'"

In obedience to the instructions of the Court the jury answered the first issue, "No, not a purchaser for value"; and the third issue, "Yes, sum of $4,199.89."

Motion for a new trial, and the plaintiff assigns as errors:

"1. The error of the Court in allowing the introduction of evidence against the plaintiff's objection.

"2. That his Honor erred in charging the jury 'this shows that the proceeds of the discount of defendants' note, although credited on plaintiff's books, has never been paid out by plaintiff.'

"3. That his Honor erred in charging the jury that 'upon this state of facts and upon the entire evidence the Court is of the opinion that you should answer the first issue No.'

"4. That his Honor erred in charging the jury that the Court is of the opinion that 'defendants may plead their deposit in the First National Bank as a set-off and counterclaim against their notes sued on'; and in further charging the jury that the defendants were entitled to plead a counter-claim in the sum of $4,199,89."

The motion for a new trial was overruled, and from a judgment for defendants plaintiff appealed.

Messrs. Ricaud & Weill, for plaintiff (appellant).

Mr. George Rountree, for defendants.

CLARK, J.: As between the defendants and the First National Bank of Wilmington the deposit of $4,199.80

would have been a good set-off in an action by said bank on the defendant's note for $5,000. 1 Morse on Bank, section 338, and cases there cited. But it would not be a set-off to an action by the plaintiff if said note was assigned before maturity for value and without notice. The presumption is that it was. It is indeed conceded that the assignment was before maturity and without notice of any equity, but it is denied that the assignment was for value.

It is not controverted that the note was sent by the First National Bank of Wilmington to the plaintiff with other notes, the whole aggregating $17,000, which were on November 23, 1891, rediscounted and the proceeds, $16,911.33, placed to the credit of the Wilmington bank, but no money was paid thereon at that time. If that were all the plaintiff was not a purchaser for value, for it had paid nothing, and to the action by it on the note the defendants could plead the set-off they had against the original payee.

It further appears, however, that the balance to credit of the Wilmington bank on books of plaintiff on close of business on November 23d was $28,338.75, including said credit of $16,911.33. There were subsequent payments to check of the Wilmington bank before notice of defendant's equity, amounting to $19,530.18. There were subsequent credits also, which left a balance due the Wilmington bank on November 28th of $21,279.33. The well-settled rule is that "the first money in is the first money out." *Boyden* v. *Bank*, 65 N. C., 13. Deducting, therefore, from the $28,338.75 on plaintiff's books, 23d November, to credit of Wilmington bank the $19,530.14 paid out to its order before November 28th, there appears only $8,808.61 of said balance which has not been paid. As the full value of all the notes rediscounted on 23d November was $16,911.33 it follows that $8,102.72 has been paid by plaintiff on said notes.

Thus the plaintiff was a purchaser for a valuable consideration, before maturity and without notice. By the law-merchant the defendants cannot set up this set-off. 1 Daniel Neg. Inst., section 758*b*; *Cromwell* v. *County of Sac*, 96 U. S., 60. It is true if (as has been said) there had nothing passed, and the plaintiff had simply given the payee credit on its books, this would not have made the plaintiff a purchaser for value. *Mann* v. *Bank*, 30 Kan., 412; *Bank* v. *Valentine*, 18 Hun., 417; *Bank* v. *Newell*, 71 Miss., 308. The same might be true if the amount paid was so small as to be merely colorable, or to suggest fraud or notice of defendant's equities.

But here the plaintiff has paid nearly half. The balance is a valid indebtedness of the plaintiff to the Wilmington bank, which passes with its other assets to the receiver of that bank to be collected and applied *pro rata* to all its creditors, including the defendants, who are creditors to the extent of their deposit. Error.

FIRST NATIONAL BANK OF RICHMOND v. JUNIUS DAVIS AND JAMES A. LEAK, Receivers of the Bank of New Hanover.

Banks and Banking—Collections—Principal and Agent—Trustee and Cestui Que Trust—Conversion—Creditor and Debtor—Insolvency.

1. Where, under an agreement between plaintiff bank and its correspondent N. H. Bank it was agreed that the latter should collect commercial paper and checks forwarded it by the plaintiff for a commission and remit daily for the proceeds, the relation of principal and agent as to any paper ceased on its collection and the relation of creditor and debtor arose immediately as to the cash (or its equivalent).

2. Where, under such agreement, the proceeds of such collections were mingled with the proceeds of the N. H. Bank, the cashier of which had no knowledge of its insolvency until its failure, the N. H. Bank cannot, upon its failure, be chargeable with a conversion of plaintiff bank's funds, since, in the absence of such knowledge on the part of the cashier, the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in full force until the failure.

CIVIL ACTION, heard at January Term, 1894, of NEW HANOVER Superior Court, before *Brown, J.* By consent a jury trial was waived and the facts were found by the Court.

The action was to establish a preferential claim against the assets of the Bank of New Hanover in defendants' hands. The action was dismissed, and plaintiff appealed.

The following is so much of the case on appeal as is essential to an understanding of the opinion: Defendant Davis is the receiver of the Bank of New Hanover at Wilmington, and defendant Leak is a receiver of a branch of said bank at Wadesboro. The Bank of New Hanover at Wilmington received drafts, notes and other evidences of debt daily from the plaintiff for collection, charging therefor one-eighth of one per cent. for all collections on Wilmington, and one-fourth of one per cent. on all collections outside of Wilmington, and agreed to remit daily. In pursuance of that agreement the Bank of New Hanover received a large number of collections from the plaintiff. Said bank collected and remitted daily, generally. The letters from the plaintiff to said bank, inclosing said collections sued for in this action, run from May 21, 1893, to June 14, 1893, and are twenty-two in number. The Bank of New Hanover made an assignment, and receivers were appointed June 19, 1893. The cashier, W. L. Smith, had no knowledge that the Bank of New Hanover was insolvent until it failed. The plaintiff kept no deposit account for the Bank of New Hanover, and the Bank of New Hanover kept no regular deposit account for the plaintiff. At the time of its failure the Bank of New Hanover had received for collection, sent to it by the plaintiff, the sum of $12,286.92. Of this sum $146.11 was received in actual money, and the remainder of the said sum was received in checks on the Bank of New Hanover and the Atlantic National Bank. The plaintiff had no knowledge of the insolvent condition of the Bank of New Hanover. The Bank of New Hanover, following the invariable custom of all banks, kept its receipts from collections and all other moneys received by it mixed together in one general fund.

Messrs. Thomas W. Strange and *Iredell Meares*, for plaintiff (appellant).

Messrs. George Davis and *George Rountree*, for defendants.

BURWELL, J.: After a careful examination of the numerous authorities cited by the counsel representing the parties to this cause we have come to the conclusion, upon the facts found, that the relation of the Bank of New Hanover to the plaintiff bank, at the time of the appointment of the defendant receiver, was merely that of debtor to creditor as to the sum of money which is in controvery in this suit. The two banks must be presumed to have entered into the contract between them with the expectation and implied agreement that, in the transaction of the business provided for by that contract, each would act according to well-known and established rules and customs in such business. *Bank* v. *Bank*, 75 N. C., 534; *Marine Bank* v. *Fulton Bank*, 2 Wallace, 252.

Now, it is a well-known and established custom of banks, when acting as collecting agents either for other banks or indeed for any customer, to put all collections made by them into the general fund of the bank, unless directed to make of them a special deposit, and use them from hour to hour and from day to day in the transaction of their current business, and, when the day or the hour arrives for making remittances, to send to the bank or other customer for whom the collection was made, not the identical currency or money collected, but money or currency taken from the general fund without any reference to its identity, or, as is far oftener done, its cashier's check on itself or some other bank, or in some way to effect a transfer of the fund by the use of credits of one kind or another, without the handling and shipping of any actual money or currency at all. Speaking of such an agreement, Justice MILLER said, in *Marine Bank* v. *Fulton Bank*, *supra*, that "the truth undoubtedly is that both parties understood that when the money was collected the plaintiff was to have credit with the defendant for the amount of the collection, and that the defendant would use the money in its business. Thus the defendant was guilty of no wrong in using the money, because it became its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago Bank and its city depositors." And he adds that "it would be a waste of argument to attempt to prove that this was a debtor and creditor relation." This is cited with approval in *Commercial Bank of Pennsylvania* v. *Armstrong*, 148 U. S., 50, where Mr. Justice BREWER said: "Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity during the intervals between the days of remitting were to be made special deposits, but, on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank and be used by it as other funds, and that when the day for remitting came the remittance should be made out of such general funds." And in that case it was decided that, as to all money actually collected by the Fidelity Bank and put into its general fund under authority implied from the customs of banks, the relation of that bank to the bank for whom it was acting as collecting agent was simply that of a debtor to a creditor.

It is true that in the cases cited above the contracts provided that the collecting bank should remit, not daily or on the day of collection, but at stated periods. But we do not think that difference in the terms of the contracts can make the principles fixed by those high authorities inapplicable here. The test is, Did the plaintiff bank agree expressly or impliedly that the proceeds of drafts, checks, etc., sent by it to its collecting agent, the Bank of New Hanover, should not be held by the latter as a special deposit, but merely mingled with the other funds coming in and used in the daily intricate payments and collections of its usual business? Such an understanding or agreement does not appear to us at all inconsistent with the expressed stipulation that remittances should be made each day. This stipulation only required that that should be done each day which, under the contracts under consideration in the cases cited above, was to be done—not daily, but at longer intervals. The important point is not, as we have said, when or how often the remittances were to be made, but whether it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc., sent it as its own in its daily transactions, keeping *memoranda* or book entries to show how much was due to the plaintiff and to other banks for whom it was doing like services, and then, at a convenient hour and in some convenient way, transferring to the plaintiff bank the money due to it. The manner of keeping the account was immaterial—a mere matter of book-keeping. If, under the contract, it was not wrongful for the Bank of New Hanover to use money coming to it from the collection of plaintiff's drafts, checks, etc., as its own and remit other money or other checks and drafts to the plaintiff therefor, then it must be that there was no breach of trust or unlawful conversion in the conduct of the officers of the Bank of New Hanover in the conduct of this business for plaintiff. It seems to us plain that both banks must have clearly understood that the relation of principal and agent, as to any particular check or draft sent for collection, ceased just as soon as cash or its equivalent was received by the collecting bank, and that immediately there was substituted for that relation, as to that cash, the relation of debtor and creditor. To announce a contrary conclusion would be to declare that the officers of hundreds of the banks of the country were daily unlawfully and wrongfully converting to the use of their institutions the property of their correspondent banks.

If the cashier of the Bank of New Hanover had become aware before its failure that the bank was insolvent that knowledge would perhaps have had the effect to annul his right, implied from the terms of the contract and the established customs of such business, to use the collected funds of the plaintiff as he did. It is found as a fact that he had no such knowledge; therefore the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in force till the failure. Here there was no unlawful conversion of the funds of the plaintiff bank, and there is no necessity for the discussion of the important question presented in the brief of the learned counsel for plaintiff in regard to following funds that have been improperly used by a faithless trustee or agent.

The plaintiff has no lien upon or right to the cash or other assets that came to the hands of the receiver that is superior to the claims of other banks whose relations to the insolvent bank were similar to the plaintiff's, or to the claims of its depositors. All these, unless some special circumstances confer special rights, must stand as mere creditors and share equally in the funds to be distributed. The judgment is Affirmed.

JAMES T. WHITE & CO. *v.* J. D. McMILLAN.

Parol Evidence—Contract of Sale—Delivery Under Contract.

1. Parol evidence is admissible in the trial of an action on a written contract to explain the meaning of abbreviations of words and figures contained therein.
2. A contract for delivery of goods "about November 1" is complied with by delivery on November 10th.
3. A contract for the sale and delivery of an article provided for payment on delivery and authorized the seller to draw for the amount; the article was shipped "C. O. D." and the purchaser in a letter to the seller made no objections to the mode of delivery, but refused to receive the property on the ground that he was unable to pay for the same, as "money was scarce" and it "cost so much"; the article remained in the express office three months when it was recalled by the seller: *Held*, in an action on the contract (1), that the fact that the article was shipped "C. O. D." was, under the circumstances, immaterial; (2), that after the positive refusal of the defendant to receive and pay for the article it was not incumbent on plaintiffs to longer keep it at the place of delivery agreed upon.

ACTION, tried at October Term, 1893, of ROBESON Superior Court, before *Connor, J.*

The suit was to recover thirty-two dollars, and the plaintiffs appealed from a judgment rendered by a Justice of the Peace. The plaintiffs declared upon the following contract for the sale of a physiological manikin:

"White's Physiological Manikin or Dissecting Cadaver, cabinet edition, $35. Obstetrical supplement, $10 extra.

"*Place and date:* LUMBERTON, N. C., May 17, 1890.

"JAMES T. WHITE & CO., Publishers, New York.

"Ship about November 1, 1890.

"GENTLEMEN:—Please deliver, according to shipping directions given below, one White's Physiological Manikin, medical edition—price $35. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35 upon delivery, for which the publishers are authorized to draw when due.

"Cr. by Obs. Sup., $10; Cr. by cash discount, $3.

"To whom sent, J. D. McMillan; town, Lumberton; county, Robeson; State, North Carolina; express office, Lumberton; express, Southern.

"(Signed) J. D. MCMILLAN.

"Agent: L. C. COWLES.

"Any statement, verbal or otherwise, to be recognized must be written on the face of this certificate."

Plaintiffs offered in evidence the original contract above set out and a letter written by defendant to plaintiffs as follows:

"JANUARY 28, 1891.

"MESSRS. JAMES T. WHITE & CO.,

"DEAR SIRS:—I am sorry that it is so that I cannot take the manikin; money is so scarce with me and it costs so much that it will be impossible for me to take it. So you can order it back when you get ready. I would take it if it was so that I could, but times are too hard with me now.

"Yours respectfully, J. D. MCMILLAN."

The plaintiffs offered in evidence a deposition taken in New York City by which they proposed to show that the manikin had been shipped by express to the defendant, $32 C. O. D., at the time specified in the contract, and was received by the agent of the express company at Lumberton, and that the credit of $10 written on the face of the contract was not a credit on the $32.

The defendant objected to this evidence, for that its purpose was to change the terms of the written contract declared on by plaintiffs, and was not within the personal knowledge of the parties testifying. The objection was sustained by the Court. Plaintiffs excepted.

The plaintiffs offered to explain the entry on the face of the contract, "Cr. by Obs. Sup., $10," by the parol testimony of the defendant. Upon objection by the defendant the evidence was excluded by the Court. Plaintiffs excepted.

The plaintiffs then introduced the agent of the express company at Lumberton, who testified that it was the custom of the company to return all uncalled for freight at the expiration of thirty days from its receipt by the company at the delivery office; that the manikin was marked C. O. D., and was received at the express office at Lumberton November 10, 1890, and was returned February 11, 1891.

The Court being of the opinion that the plaintiffs had failed to show a compliance with the contract and were not entitled to recover, the plaintiffs submitted to a nonsuit and appealed.

Messrs. McNeill & McMillan, for plaintiffs (appellants).

No counsel *contra*.

BURWELL, J.: The first and second sections of the plaintiffs' complaint are as follows:

"1. That on or about the 17th of May, 1890, the defendant executed and delivered to plaintiffs a written contract or order (which is set out in the statement of the case and made part of this allegation).

"2. That by said contract or order the defendant requested plaintiffs to deliver for him, freight prepaid, at the Southern Express office in Lumberton, N. C., one of White's Physiological Manikins, medical edition, in consideration of which the defendant promised to pay the plaintiffs the sum of $32 upon delivery at said express office."

The answer does not controvert these allegations. The failure to deny these averments is equivalent, of course, to an admission of the facts alleged. Hence it seems to us that the sum to be paid by defendant to plaintiffs for the article named in the contract was fixed by the pleadings themselves, and, while it was competent for the plaintiffs to explain by parol testimony what was meant by the words and figures "Cr. by Obs. Sup., $10". (*Cumming* v. *Barber*, 99 N. C., 332, and *Simpson* v. *Pegram*, 112 N. C., 541), if an explanation of them had been necessary for supporting their allegation that $32 was the price agreed upon, the answer has relieved them from that necessity, if it ever existed.

Plaintiffs' evidence showed that the "manikin" was at the express office in Lumberton, the place specified in the contract as the place of delivery, on November 10, 1890, consigned to defendant. The contract provided that it should be shipped from New York "about November 1, 1890." In respect to time, therefore, the plaintiffs complied with their contract. The package was marked, it is true, "C. O. D," while the contract merely stipulated that the defendant would pay for the article "upon delivery," and authorized the plaintiffs to draw for the price when due. The letter of the defendant, introduced in evidence by the plaintiffs, seems to disclose the fact that he made no objections to this manner of delivery and collection, but put his refusal to receive the property and pay for it solely upon the ground that "money was scarce" and that "it cost so much." This letter, unexplained, seems to us to amount to a concession on the defendant's part that the plaintiffs had complied with their part of the contract, and to a positive refusal on his part to receive or pay for the property. It was no longer incumbent on plaintiffs to keep it at the place of delivery agreed upon, for the defendant had notified them that he would not accept it in any event. Thereafter no course was open to the plaintiffs but to recall the property and sue for damages for breach of the contract on defendant's part, as they have done in this action.

The judgment of nonsuit must be set aside.

Error.

WADESBORO COTTON MILLS COMPANY v. CHARLES M. BURNS.

Corporation—Subscription to Stock—Stockholder.

1. Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized.
2. The fact that a corporation avails itself of only one of several privileges granted by its charter—that is, manufacture all the products it is permitted to manufacture—does not invalidate the act of incorporation.
3. Where articles of agreement signed by a subscriber to the stock of a corporation provided that the installments falling due on the subscription should bear eight per cent. interest, such rate continues until actual payment.

CIVIL ACTION by the plaintiff corporation to recover from the defendant his unpaid subscription to the stock of the corporation, tried before *Shuford, J.*, and a jury, at November Term, 1893, of ANSON Superior Court.

The facts appear in the opinion of Chief Justice SHEPHERD. From a judgment for the plaintiff defendant appealed.

Messrs. James A. Lockhart and *R. E. Little*, for plaintiff.

Mr. R. T. Bennett, for defendant (appellant).

SHEPHERD, C. J.: Conceding, what does not seem to be very clear, that the Clerk of the Superior Court, being a corporator, had no authority to probate the articles of incorporation upon the oath of a subscribing witness, and also to acknowledge its execution by himself, and that the incorporation of the plaintiff company was for that reason irregular, we are unable to see how the supposed defect is available as a defence under the circumstances of this case.

In *Swartwont* v. *Michigan Air Line Railroad Co.*, 24 Mich., 389, *Cooley, J.*, in delivering the opinion of the Court, said: "That where there is a corporation *de facto* with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporations, it is plainly a dictate, alike of justice and of public policy, that, in a controversy between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised." This rule, says Mr. Cook (Vol. I, Stock and Stockholders, section 185), is sustained by the great weight of authority and is also fully approved by other authors. Mr. Morawitz says (Vol. II, Pr. Corp., 743): "It may be stated as a general rule, subject to the limitations heretofore referred to (which limitations do not apply to this case), that if a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership, he cannot, when called upon to perform the obligations of his contract, set up as a defence that the corporation was not legally organized, or that he did not comply with the requirements of the law in becoming a member." To the same effect are Thompson's Liability of Stockholders, section 173, and 2 Beach Pr. Corp., section 576, and the numerous cases cited in the notes. As bearing upon the general subject and in support of the foregoing views, reference may also be made to some of the decisions of this Court. *Elizabeth City Academy* v. *Lindsey*, 6 Ired., 476; *Tar River Navigation Co.* v. *Niel*, 3 Hawks, 537; *Railroad Co.* v. *Thompson*, 7 Jones, 387; *Marshall* v. *Killian*, 99 N. C., 501.

If we apply the above principles to the facts of this case it is manifest that the defendant is liable as a stockholder of the plaintiff company. He subscribed to the articles of incorporation and these were proved in the manner hereinbefore stated and filed under the provisions of chapter 16 of *The Code*, on the 22d of August, 1890.

The defendant was elected a director by the stockholders and served as such at a meeting of the directors on September 26, 1890, when a contract for a mill building was made. He continued to be a director until July 13, 1891, when he tendered his resignation. The mill has been in operation nineteen months and all of the subscribers have paid up their subscriptions as they became due except the defendant and two others, the latter having paid a part only of what is due by them. There was also evidence that defendant promised to pay in cotton and also in money.

In view of all these circumstances we cannot hesitate in sustaining the charge of his Honor that if the defendant "subscribed the said articles of agreement and participated in the organization of the company and acted as one of its directors, all objection to the validity of its formation and organization was deemed waived by him, and as to him the articles of incorporation were binding notwithstanding the alleged irregularity in the probate thereof." The objection that there has been a departure from the original purposes of the corporation because it has not seen fit to do anything but spin yarns out of cotton (one of the several objects of the corporation) is equally untenable. This is a matter addressed to the discretion of the company, and if they do not avail themselves of all of their corporate privileges—that is, manufacture all of the things they are permitted to manufacture—this surely does not avoid the act of incorporation. Neither can we agree with the learned counsel that there was error in charging the defendant with eight per cent. interest. This is a legal rate when expressly stipulated for, and this amount, being specified in the articles of incorporation, is what the defendant contracted to pay by his subscription, and his obligation to pay this rate continues after maturity and until actual payment. *Womble* v. *Little*, 74 N. C., 255. The case just cited is also authority against the defendant's contention that the judgment should bear interest at the rate of six per cent. only.

Affirmed.

J. L. McLEAN v. NANCY SMITH et al.

Adverse Possession—Lappage—Conflicting Grants—Evidence.

1. In an action by a junior grantee against a senior grantee to recover possession of land included in both grants by reason of a lappage, it appeared that plaintiff and his predecessors were in possession

of a portion of the lappage for more than seven years before defendant entered on, and actually occupied, another portion of it; the only evidence of any attempt by defendant to exercise dominion over the lappage before such entry was that her tenants entered at intervals and cut timber for rails and removed pine straw from it: *Held*, that it was error to submit to the jury the question as to whether defendant, during such seven years, occupied and used any portion of the lappage "for any purpose such land could be used for," it not having been shown that the land was unfit for cultivation and had been used for the statutory period for the only purpose for which it was available.

2. In such case it was error to refuse to allow the plaintiff to show what his intent was in inclosing the part of the lappage occupied by him.

This was a CIVIL ACTION, tried before *Graves, J.*, at Fall Term, 1890, of ROBESON Superior Court.

There was documentary evidence tending to show title in plaintiff and those under whom he claims of the land described in his grant dated 20th December, 1791, by successive links, as follows: Grant to Angus Smith, dated 20th December, 1791; deed from Angus Smith to Daniel Smith, dated 20th August, 1795; deed from Daniel Smith to Gilbert Taylor, dated 10th April, 1797; deed from Gilbert Taylor to John McLean, dated 25th December, 1810; deed from John McLean, of Richmond county, North Carolina, to John McLean, of Robeson county, North Carolina, dated 1st April, 1831; deed from J. C. McCaskill and others to J. L. McLean, dated 19th December, 1884.

Also there was evidence of the same character tending to show title in the defendant Nancy Smith and those under whom she claimed of the land described in grant to Richard Smith, and successive links, as follows: Grant to Richard Smith, dated 18th May, 1789; deed from Tryon Smith to Daniel Smith, dated 1st December, 1794; deed from Daniel Smith to Archibald and John Smith, dated August, 1795; deed from Archibald and John Smith to Duncan Smith, dated 11th March, 1799.

The plaintiff, J. L. McLean, testified as follows: "My father was John F. McLean, of Robeson county; he died fifteen years ago; his heirs are McCaskill's wife, my sister Amanda, and myself; John McLean was my grandfather; John McLean, grantee in the deed of 1831, was my father; I claim the beginning corner at 'Red O'; I made rails near the line A B; she (Miss Nancy Smith) complained I had gone over the line; she pointed me to a large tree which had been cut for ton-timber; she told me that was the corner; I was with Purcell when he surveyed; found marked tree twenty steps; at one hundred yards found a fore and aft marked tree, and further on found others, until we got into the field; from B to C old field; from C to D found only a hickory marked, but I do not think it was marked as a line tree of the grant; from D to E, field; from E to A found several old marked trees; cut in and found marks were old; one marked tree inside of fence; tenant of Nancy Smith occupies a little patch on the lappage; my dwelling is on the 100-acre grant; my father built the house I live in; I am fifty years old; my father cleared most of it; I have cleared some since; 'Red X' has been cleared and in cultivation ever since I can remember; I think, from the appearance of the land, my father had moved in the fence in his life-time as much as an acre, and I turned out some when I moved the fence in again; the land had been worn out; between 'Red X' and 'Red O' uncleared; I have cut one stick of timber, hauled straw, cut rails and wood on it; my father had made rails on it and used it for same purpose that I used it; defendant never forbade me from such uses of said space; there is not more than one-fourth of an acre in 'Red O'; Miss Smith's tenant is in possession of a little field, or patch; my fence does not follow line A B; possession at 'Red O' was begun in 1879 or 1880 by defendant Henry McLean, Miss Nancy Smith's tenant, and the same occupant has been there all the time since."

Cross-examination.—"I did not get permission to gather straw; did not ask for leave then; I meant there was one-fourth of an acre under fence; the fenced part of the land is nearly thirty acres; Miss Smith is nearly seventy years old; the appearance of the land indicates that it has been used; it is grown up in old fields; I suppose they used it for such purposes as it was fit for; it was not boxed; I knew D. S. Morrison; he was a surveyor. I did not see him survey Nancy Smith's land; we surveyed part of my land somewhere about 1879 or 1880, after Henry McLean went there; I knew there was a lap, had heard my father say so; I did not know exactly where the line was; I had cut rails west of A B; Nancy Smith claimed that and showed me the beginning corner of the line: I knew almost where the line was before; think I knew within four yards before 1880; Morrison did not run all my lines; I said on former trial I did not know where my land was; I do not know about land being divided by Fairly; this land in dispute is near both lines; Smith had a corner at A." The defendant proposed to ask the plaintiff as to his intent in occupying the land. Plaintiff objected. Objection overruled. Plaintiff excepted. "I found fence there (at 'Red X'), and kept it there to assert my right from the time I took charge of the land; my father died in 1876, and I took charge then."

Re-direct.—"Defendant had no occupancy at 'Red O' before Henry McLean added to his clearing in 1879, and took in 'Red O'; the general direction of Lumber river is south-east."

Daniel Leach testified for the defendant as follows:

"Nancy Smith raised me; I know the land in dispute; we got wood and straw there; I am thirty-odd years old;

got wood and hauled straw and lightwood, everything we could use the land for; I was big enough to haul straw; I knew J. F. McLean; never saw him or his hands at work there."

Cross-examined.—"I hauled some straw off since Henry went there; can't tell when I hauled last straw before Henry went there; I found out there was a lap a few years ago, about the time these surveys were made; Miss Nancy Smith always claimed the land, and we never knew there was any dispute; she did not know of any lapping land."

There was other testimony to the same effect.

The following issue was submitted to the jury:

"Is the plaintiff the owner and entitled to the possession of the land described in the complaint, or any part thereof?

"If so, what part?

"What is rental value of the land?"

The plaintiff prayed the Court to instruct the jury as follows:

"1. That if they believe the testimony as to location of the 100-acre grants, dated respectively, 20th December, 1791, and 18th May, 1789, under which plaintiff and defendants deduce their title, it presents a case of lapping or interfering grants.

"2. That if the jury believe from the evidence that the plaintiff and those under whom he claims have had actual possession under color of title for seven years or more, by inclosing and cultivating the same, of the land in space 'Red X,' being actually seated on same, the defendant, nor those under whom she claims, not being seated on the interference at all during this time, the possession of the whole lappage covered by both grants would be in the plaintiff exclusively, the possession of part including in both grants being possession of all of it, and plaintiff would have a good title to the whole, and would be entitled to recover, though his is the junior grant."

It appeared on the trial that this same case had recently before been heard on appeal in the Supreme Court, and the opinion of the Supreme Court was read and commented on by the counsel on both sides, the counsel for plaintiff insisting that upon the proof in this trial the plaintiff was entitled to the entire lappage, and the defendant insisting that the evidence in this trial that the possession of plaintiff was confined to so small a space that the jury might reasonably infer that the plaintiff entered by mistake, not intending to assert his right, so that his occupation was not adverse; and further, that if plaintiff's occupation was adverse it could not be extended beyond the actual occupation to the entire lappage, because, as the defendant insisted, she had openly and continuously actually used that part of the lap not inside plaintiff's fence for all purposes for which such land could be used. There was also much contention as to the location of the conveyances offered in evidence. The plaintiff asked the instructions set out in the case, and the defendant also asked instructions, which are not material to be set out.

The charge was in substance:

"The construction of written instruments is usually a matter of law for the Court to determine. So it becomes the duty of the Court to say whether the descriptions in grants and deeds offered in evidence are sufficiently certain to admit of location by the aid of the oral testimony of witnesses. Upon reading and inspecting all the deeds and grants offered in evidence the Court instructs you that each one of them is sufficiently certain in description to admit of proof as to its proper location. What are the boundaries in a deed or grant is a matter to be determined by the Court; where the boundaries are to be located is a matter of fact to be settled by the jury upon all the evidence. Now the boundaries are the lines called for in the deeds and grants; that is, the several objects called for and the courses and distances when not controverted by natural objects or the known boundaries of other tracts. It sometimes happens that a mistake is made in writing the calls in a deed, and if it palpably appear that such mistake has been made we may correct it. That in an endeavor to locate deeds and grants the area or quantity called for may be shown in evidence to aid the jury in determining the location of boundary. These instructions as to locating the boundaries called for in deeds and grants apply to the deeds and grants offered by each party alike.

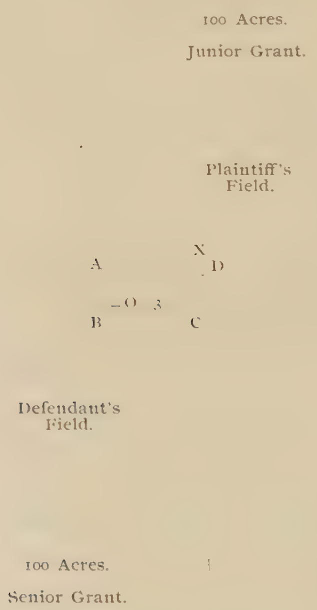
"If the jury shall find that lands claimed by plaintiff are located as he claims, and that land claimed by defendant is located as she claims, and shall find that the several mesne conveyances offered by plaintiff cover the land covered by the grant under which he claims, and the several mesne conveyances offered by defendant cover the same land covered by grant under which she claims, then there is a lapping of the boundaries of the plaintiff over inside the boundaries of the defendant, and this is what the lawyers and law-books call a lappage or interference. In such cases—that is, when boundaries called for in the deed of one claimant lap over inside the boundaries called for in the deed of a rival claimant and neither party is in the actual occupation of the lappage—the law adjudges the possession to follow the better title. In this case the grant under which the defendant claims is the older grant, and if nothing more appeared than this one fact she would have the better title; but the plaintiff insists that he has shown other facts; the plaintiff insists that he has shown that for a longer time he has had actual, open and continuous possession of a part of this lappage by fencing, clearing and cultivating it. If he has had such occupation more than seven years such occupation gives him the title to all he has so occupied, and to the whole of the lappage, if nothing more appears, but the defendant insists that she has been in the open, notorious, continuous occupation of a part of the lappage, all outside of plaintiff's fences, for a long time, using it for all purposes for which such land could be used. If this is true then she is entitled to all the lappage not actually occupied by the plaintiff; the mere hauling pines or pine straw, or wood, occasionally, would not be sufficient, but if she, openly and notoriously and continuously for several years occupied it and used it for every purpose such land could be used for, then she would be entitled to all outside of plaintiff's possession at 'Red X.'

"The defendant insists that the land at 'Red X' is so small in quantity that the jury must believe it was inadvertently entered upon by plaintiff, and that he has not held it adversely, intending thereby to assert his right. In some cases it occurs that adjoining owners, by mistake, place the fence a line away from the line, not intending to assert any rights; but in such a case as this, if you believe that the plaintiff, and he, or those under whom he claims, built his fence, inclosing the land and cultivating it for more than seven years, then the plaintiff has title to all the land inside his fence at 'Red X,' and he is entitled to the whole lappage, unless the defendant has shown that she has been in possession of some part of the lappage for seven years before this suit began, using continuously and adversely for all purposes for which such land could be used. But if she has been in such open, continuous, notorious possession under her claims of right, then she would have title to all that part of lappage outside the plaintiff's fence, and in determining how this is the jury may consider the evidence as to situation and quality of the land, and for what purposes it can be used, and also to consider the evidence of defendant as to what use she did make of the land in the lappage, as by hauling straw, getting lightwood, etc., but merely hauling straw and getting lightwood occasionally is not sufficient evidence; it must appear she used the lands for all purposes it was fit for, continuously under claim of right, openly and notoriously."

There was a verdict on the first issue that the plaintiff is entitled to all the land claimed except that part of the lappage outside of his fence, and to that the defendant was entitled.

The plaintiff moved for a new trial, which was refused, and from the judgment for the defendant the plaintiff appealed.

The following is the map referred to in the opinion:



Mr. Thomas A. McNeill, for plaintiff (appellant).
Messrs. Black & Patterson, for defendant.

Avery, J.: According to the undisputed testimony the plaintiff and those through whom he claims had been in possession, under the junior title, of a small portion of the lappage (marked "X" on the map) for about forty years; at all events for more than seven years before the defendant's tenant in the year 1879 first entered upon and actually occupied a portion of it (marked "O" on the map) in the assertion of her claim under the older title. The only evidence offered to show any attempt by defendant to exercise dominion over the lappage before 1879 was that her agents or tenants entered at intervals and cut timber for rails and removed pine-straw from it. Such occasional acts did not constitute an occupation that would mature title or arrest the running of the statute in favor of the plaintiff, if he, claiming under the junior title, had inclosed and was cultivating a portion of the lappage. *McLean* v. *Smith*, 106 N. C., 172; *Ruffin* v. *Overby*, 105 N. C., 78; *Williams* v. *Wallace*, 78 N. C., 354. The Court below erred when upon such testimony the jury were left to determine whether the defendant for seven years occupied and used any portion of the lappage "for any purpose such land could be used for." There was no evidence that she erected a house or made an inclosure upon the interference prior to 1879, five years before suit was brought. The instruction would have been warranted by the testimony if it had been shown that the land in controversy was not susceptible of cultivation and had been used continuously for the statutory period for the only purpose for which it is available, but not when the exercise of dominion consisted in getting pine straw, cutting rails or fire-wood at intervals. *McLean* v. *Smith, supra; Tredwell* v. *Riddick*, 1 Ired., 56; *Bynum* v. *Carter*, 4 Ired., 310; *Bartlet* v. *Simmons*, 4 Jones, 295; *Loftin* v. *Cobb*, 1 Jones, 406, and *Williams* v. *Wallace*, *supra*. The witnesses testified that she had not at any time boxed any of the trees in order to get turpentine. If this error was not sufficient it seems that the Court refused to allow the plaintiff to show his intent in inclosing a portion of the lappage at "X," which it was certainly competent for him to do. While we held on the former appeal that the presumption generally arose that a person entered on any land within the limits of his deed in the assertion of a claim of title to outside boundaries of it, and that the presumption was strengthened by the fact that the plaintiff had inclosed the site of defendant's corner, and other circumstances mentioned, it was not intimated that the defendant would be precluded from showing circumstances competent and calculated to rebut the presumption, nor is there any reason why the plaintiff may not strengthen the presumption by showing that he did not enter on the lappage by mistake, but actually intended to assert his title thereto by such occupation.

The learned Judge who tried the case was doubtless led into error, as suggested, by the fact that his attention was not directed to the opinion on the former appeal. The plaintiff is entitled to a New Trial.

EVERETT, WALL & CO. v. JOHN REYNOLDS et al.

Practice—Irregular and Void Judgments—Foreclosure of Mortgage—Confirmation of Sale—Motion to Set Aside Decree.

1. Where, after a decree ordering a sale of land, in a suit to foreclose a mortgage, the defendant mortgagor died and his heirs were not made parties and the sale was made and confirmed without notice

to the heirs, the decree confirming the sale was irregular but not void.

2. The proper remedy to have an irregular judgment, though final, set aside is by a motion in the cause.
3. A motion to set aside an irregular judgment confirming the sale of land in foreclosure proceedings will not be allowed where there is nothing to indicate that the parties have been or may be prejudiced thereby.

This was an ACTION to foreclose a mortgage, at the February Term, 1890, of the Superior Court of RICHMOND county, and a decree of foreclosure was regularly entered against the defendants and commissioners were appointed to sell the land for cash to the highest bidder and to report said sale to the Court for further directions. After this decree was made the defendant John Reynolds, the mortgagor, died, but his death was not suggested to the Court, and some time thereafter the commissioners exposed the land for sale, at which sale one of the heirs at law, N. R. Reynolds, became the highest bidder in the sum of $432. He failed to comply with the bid, and the commissioners accepted the next highest bidder, E. N. Ingram, whose bid was only one dollar less than that of the said N. R. Reynolds. The commissioners reported that the sale was duly advertised and properly conducted and that the land brought a fair value. The Court declared that the bid of the said N. R. Reynolds was not *bona fide;* confirmed the sale; ordered that title be made to the purchaser Ingram, and that the purchase-money be collected and applied to the satisfaction of the judgment and costs, and that the balance be paid "to the defendants or such person as may have a lien on the lands sold." The purchase-money was paid and applied as directed by the Court and a deed executed to the said purchaser. The said N. R. Reynolds and the other heirs were never made parties to the action, nor were they notified of the report of the commissioners nor of the confirmation thereof. These parties moved before his Honor *Bryan, J.*, at February Term, 1894, that the sale be set aside.

The motion was granted, and the plaintiffs and the purchaser appealed.

Messrs. Batchelor & Devereux and *Strong & Strong*, for plaintiffs.

Messrs. Guthrie & Morrison and *T. A. McNeill*, for defendants (appellants).

SHEPHERD, C. J. (after stating the facts): It is well settled that the judgment of the Court confirming the sale was irregular and not void (*Lynn* v. *Lowe*, 88 N. C., 478; *Knott* v. *Taylor*, 99 N. C., 511; *Wood* v. *Watson*, 107 N. C., 52), and it has also been decided that a motion in the cause is the proper remedy to have such a judgment vacated although it be final. *Carter* v. *Rountree*, 109 N. C., 29; *McLaurin* v. *McLaurin*, 106 N. C., 331, and the cases cited.

Conceding that the purchaser, a stranger, is affected with the irregularity because the record would have disclosed a want of notice of the motion to confirm, we are nevertheless of the opinion that the motion setting aside the final judgment should not have been allowed. We think that such an order should not have been made unless there was something in the affidavits which tended to show that the heirs were prejudiced by reason of the irregularities complained of.

In *Stancil* v. *Gay*, 92 N. C., 455, the Court said: "But if there were irregularities in the proceeding, affecting the decree, the appellants would not, as they seem to suppose, be entitled to have it set aside on that account, as of course. In such case it would behoove them to show that the alleged irregularities affected them adversely in a material respect."

In *Williamson* v. *Hartman*, 92 N. C., 236, the Court said: "Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining, interested in it, or when the judgment is void." See also, *Peoples* v. *Norwood*, 94 N. C., 167; 1 Freeman Judgments, sec. 102.

Now, if we apply this principle to the present case, it would seem very plain that the motion should not be allowed. There is not the slightest suggestion that the sale was unfair, or that the land did not bring its full value; nor is there any objection on the part of N. R. Reynolds to the finding that he was not a *bona fide* bidder. Indeed, there is nothing to indicate that these parties have been in any way prejudiced, nor does it appear that they may be prejudiced, since they do not offer to redeem the land, nor do they pretend that at another sale it will bring a greater price. If we were to set aside the judgment it would, under these circumstances, be our duty to confirm it again, and to avoid doing so vain a thing the Court requires that there must be some evidence that the motion is based upon meritorious grounds.

For these reasons we think that the order of the Court should be Reversed.

*A. A. McEACHERN, Administrator of M. A. McEachern, et al. v. D. STEWART et al.

Trust—Trustee—Purchase by Trustee of Trust Property—Charge on Land.

1. Trust funds must be managed exclusively in the interest of the beneficiary, and cannot be employed so as to work a benefit or profit to the trustee.
2. S., a Clerk of the Superior Court, having a trust fund in his hands which he was ordered to invest, loaned it upon a third mortgage on land on which he had, in his own right, a second mortgage, and the amount thus loaned was applied to the credit of the first mortgage, thus increasing the security of the second mortgage; at the expiration of his term of office he turned over the bond and mortgage to his successor without an order to that effect or without notice to the *cestui que trust* or those entitled in remainder; afterwards in a proceeding for the foreclosure of the mortgages, to which neither the *cestui que trust* nor those entitled to the remainder in the fund were parties, the land was sold and purchased indirectly by S. and the proceeds were insufficient to pay the third mortgage: *Held* (1), that the mortgage held by S. in his own right should have been postponed to that which he took as trustee for the plaintiffs; (2), that the equitable rights of those entitled to the trust fund could not be affected by the simple turning over of the bond and mortgage by the trustee to his successor in office as Clerk, and the trust relation, therefore, still existing, the liabilities growing out of it may be enforced by way of a charge upon the land of which the trustee became the purchaser; (3), the confirmation of the sale, the Court not having knowledge of the fact that the trustee was the real purchaser, did not destroy the trust relation.

Civil action, tried before *Connor, J.*, and a jury, at September Term, 1893, of Richmond Superior Court.

From a judgment for the plaintiffs the defendant Stewart appealed. The facts appear in the opinion of the Chief Justice.

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*Burwell, J., having been of counsel, did not sit on the hearing of this case.

Messrs. T. A. McNeill, N. A. Sinclair and *T. H. Sutton*, for plaintiff.

Messrs. Walker & Cansler, for defendant (appellant).

Shepherd, C. J.: The defendant, Dugald Stewart, at Spring Term, 1878, of Richmond Superior Court, was ordered to invest $500, then in his hands, "either in real estate or United States bonds, * * * and receive and pay over the interest annually to Margaret Ann McEachern during her life, and after her death to such of her children as may be living at the time of her death." He loaned the money to his brother, Angus Stewart, who executed to him a mortgage on a tract of land which was already encumbered by two mortgages—one to James C. McEachern for $748, and the other to himself for $1,000. These mortgages had been due for some time and no part of the principal or interest had been paid. The trust fund so invested by the defendant was applied as a credit upon the first mortgage, and as this credit strengthened the security of the second mortgage held by the trustee he was very plainly using the trust fund in such a manner as to enure to his own benefit. The fact that in making such investment he was free from any actual fraudulent purpose is immaterial, as it is an inexorable rule in a court of equity that trust funds must be managed exclusively in the interest of the beneficiary, and cannot be employed so as to work a benefit or profit to the trustee. 1 Perry on Trusts, 464. "The rule seeks to remove all temptations to the hazardous risk of the funds, and to place it under the supervisory control of one *whose only interest, coinciding with legal duty*, will be to secure its safety and all its benefits to the rightful owner. The law frowns upon any act on the part of a fiduciary which places interest in antagonism to duty, or tends to that result." *Railroad* v. *Wilson*, 81 N. C., 223.

Applying these principles to the case before us, it is manifest that the mortgage held by the said Stewart for his individual indebtedness should have been postponed to that which he took as trustee for the plaintiffs (*McEachern* v. *Stewart*, 106 N. C., 336), and it is equally clear that these equitable rights of the plaintiff could not be affected by the simple turning over of the bond and mortgage by said trustee to his successor in the office of Clerk of the Superior Court. We think that his Honor very correctly held that the trust relation could not be determined in such a manner, and we are also of the opinion that it still exists, and that the liabilities growing out of it may be enforced by way of a charge upon the land of which the trustee has become the purchaser. It is found as a fact that the plaintiffs had no knowledge of the investment, nor was a report thereof made to the Court; neither were they parties to the foreclosure proceedings under which the land was sold and finally indirectly purchased by the said trustee; nor did they have any notice of the several sales or the orders made in reference to the same. It is true that Mr. Long, the Clerk of the Court, was a party, but this did not relieve the trustee, who was also a party, of the duty of looking out for the interests of the *cestui que trust*, and very certainly he could not become the purchaser of the property except upon full notice to the plaintiffs and the sanction of the Court, so as to defeat the equitable priority to which they were entitled, as against him.

Under these circumstances we attach no importance to the fact that at two previous sales the property brought enough to pay the whole debt, and that afterwards it was sold for an insufficient price and was confirmed by the Court. The Court was not informed that the purchase was made by an agent of the trustee, and we do not think that such confirmation affects the case. *Patton* v. *Thompson*, 2

Jones' Eq., 285; *Elliott* v. *Poole*, 3 Jones' Eq., 17; *Van Epps* v. *Van Epps*, 9 Paige, 238; *Fox* v. *Macreth*, 1 W. & T. L. E., 253. The whole transaction—the loan, the sale, the purchase by the trustee and the confirmation were all made without notice to these plaintiffs; and while their joinder may not have been strictly necessary, still their equitable rights could not be displaced and defeated by their trustee except upon full disclosure and consent. It may also be observed that since the sale the trustee has declined an offer of $3,500 for the said land, and that it is now worth $3,000, an amount greater than is necessary to pay the entire indebtedness.

We have examined the other points raised by counsel with great care, and find nothing which satisfies us that there was error on the part of his Honor in charging the land with the amount mentioned in the judgment.

Affirmed.

JULIA A. RITTER v. LEWIS GRIMM.

New Trial—Case on Appeal—Judge Out of Office—Loss of Trial Papers.

1. The mere fact that a Judge who tried a cause has gone out of office will not prevent his settling the case on appeal.
2. Where the trial Judge is unable to settle the case on appeal because of the loss of his notes of the trial and of the papers, and the parties cannot agree on a case, and the appellant has been diligent in endeavoring to have the case on appeal settled by the Judge, a new trial will be granted.

At August Term, 1893, of MOORE Superior Court, before *Connor, J.*, the plaintiff obtained judgment against the defendant, who appealed and afterwards sued out a writ of *certiorari*, in the return to which it appeared that the trial Judge to whom the papers were sent to make out the case on appeal had resigned before they were so sent and that he had misplaced his trial notes and papers and could not state the case on appeal. The parties were unable to agree upon a case, and the defendant had been diligent in endeavoring to have the same settled.

Mr. John W. Hinsdale, for appellant.

No counsel *contra*.

CLARK, J.: The mere fact that the Judge who tried the cause has gone out of office will not prevent his settling the case on appeal. The defect in that regard, formerly existing in the statute, was remedied by section 550 of *The Code*, in the latter part of the section. But it further appears that the papers were sent to the Judge and are lost, and that there has been no laches on the part of the appellant, who has been diligent in endeavoring to have the case on appeal settled by the Judge. This the Judge is unable to do by reason of the loss of the notes of the trial and the papers, and the parties are unable to agree upon a case. Under these circumstances a new trial must be ordered. *Owens* v. *Paxton*, 106 N. C., 480; *Clemmons* v. *Archbell*, 107 N. C., 653; *State* v. *Parks*, *Ibid.*, 821. New Trial.

C. P. VANSTORY v. A. G. THORNTON et al.

(DEFENDANT ELSIE THORNTON'S APPEAL).

Pleading—Frivolous Answer.

In an action begun as a proceeding for the re-allotment of homestead, but which, by consent of the judgment creditor and debtor and the mortgagees of the latter, had become one for the foreclosure of mortgages, the plaintiff caused the wife of the judgment debtor to be made a party defendant for the purpose of enabling her to assert any rights she might have; she filed an answer which tended to revive issues which had been finally adjudicated between plaintiff and her husband instead of setting up any rights of her own: *Held*, that such answer was immaterial and was properly disregarded by the Judge below.

This cause, which has before been to the Supreme Court and is reported in the 112th N. C. Reports at page 196, came on for further hearing before *Shuford, J.*, at November Term, 1893, of CUMBERLAND Superior Court.

Since the last term of this Court the land in controversy was sold under a decree of this Court by commissioners appointed for that purpose and a report of said sale was made to the present term of the Court. Upon motion to confirm the report Elsie, the wife of A. G. Thornton, who had been made a party since last term of the Court, and after said sale, by summons issued at the instance of the plaintiff, made objections to the confirmation of said report, and filed exceptions thereto, and also filed an answer to the complaint. The Court fully considered the exceptions and answer filed by the *feme* defendant, and held that the same raised no material or valid issues, and overruled the exceptions, and held the answer to be immaterial and confirmed the report of the commissioners, and ordered them to make title to the purchaser. To this ruling of the Court the *feme* defendant excepted and appealed.

Mr. Thomas H. Sutton, for plaintiff.

Messrs. George M. Rose and *N. A. Sinclair*, for defendant (appellant).

Burwell, J.: The appellant is the wife of the defendant A. G. Thornton, and was made a party defendant at the instance of the plaintiff since this cause was last before this Court (112 N. C., 196). The action having become, by consent of the plaintiff judgment creditor, the defendant judgment debtor and the latter's mortgagees, an action to foreclose the mortgages and distribute the fund among the lienors, the plaintiff saw fit to summon the wife of the judgment debtor and mortgagor that she might have an opportunity to assert any rights she might have in the premises, and that she might have time and opportunity to defend such rights as she might assert. This was not improper. *Nimrock* v. *Scanlin*, 87 N. C., 119. As to her the mortgagees are the actors. The plaintiff's judgment and his proceedings to enforce its payment cannot affect her rights either of dower or homestead. Yet the answer which she filed seems to have been directed entirely towards reviving issues between the plaintiff and her husband, which have already been adjudicated finally, and to which she was not a necessary or proper party, and to have left unnoticed the substantial facts, to-wit, that the land to be sold under the mortgage was her husband's land, not hers, and that she had by proper deeds released to the mortgagees all her right of dower and homestead therein. Having failed to controvert these facts, they are to be taken as true. Her answer was therefore, as his Honor held, immaterial, and it was very properly disregarded in the order making the final adjudication of the rights of the parties in this matter that has been for so long a time the subject of litigation. Her presence in court and the answer she filed merely show for the protection of all parties concerned that she has no rights left in the premises to assert and defend.

Affirmed.

C. P. VANSTORY v. A. G. THORNTON et al.

(PLAINTIFF'S APPEAL).

Homestead—Priority of Liens.

(For syllabus see paragraph 6 of the syllabus in same case reported in 112 N. C., at page 196).

CLARK, J., dissents, *arguendo.*

Under a former decree of the Court (following the directions of the opinion of the Supreme Court as reported in *Vanstory* v. *Thornton*, 112 N. C., 196) the land described in the pleadings and in the several mortgages mentioned was sold by commissioners appointed for that purpose, and a report of sale made to CUMBERLAND Superior Court at Fall Term, 1893. At said last mentioned term of the Court an order and decree of confirmation was made, and the plaintiff thereupon insisted that the proceeds of sale, or so much thereof as was sufficient for that purpose, should be applied to plaintiff's judgment, interest and costs, before any part thereof was set apart to defendant as a homestead, or in lieu of homestead, or applied to the previous mortgages, and moved the Court to apply the proceeds according to his contention. The Court declined to so apply the proceeds, except the excess of one thousand dollars, and signed judgment accordingly, and thereupon plaintiff excepted and appealed.

Mr. Thomas H. Sutton, for plaintiff (appellant).
Messrs. George M. Rose and *N. A. Sinclair*, for defendants.

BURWELL, J.: The decree making a distribution of the fund arising from the sale of the land described in the mortgages is in exact accordance with the judgment of this Court at February Term, 1893 (112 N. C., 196).

CLARK, J., dissenting: The decision of this case, 112 N. C., 196, is *res judicata* as to what had then taken place, but in regard to the directions as to the distribution of the fund not then in existence the opinion of the Court, while clearly expressed (p. 206), was necessarily *obiter*. It was not a decision upon any point then before the Court, and is now presented directly for the first time.

The Court in that case (p. 209) advert to the fact that *Adrian* v. *Shaw*, 84 N. C., 832, had affirmed the assignability of the homestead right, and that *Fleming* v. *Graham*, 110 N. C., 374, had denied it; and the majority of the Court adhered to the older instead of the later decision. Taking, therefore, that *Adrian* v. *Shaw* is the settled rule as to the disposition of this case, it would seem that the *obiter dictum* of the Court, which now comes up for direct decision by the plaintiff's appeal, is an inadvertence.

Adrian v. *Shaw* holds that the conveyance of the homestead lot carries it to the grantee clothed with the homestead right. If so, when conveyed by such grantee to another grantee it must preserve the same immunity. Now, the conveyance of the homestead lot by Thornton and wife to his mortgagee carried the same rights, if the mortgage was not paid, as a direct conveyance would, and when conveyed by the mortgagee (or by sale under the mortgage) the homestead lot passed to a purchaser; it passed of course with the same immunity. A mortgage is no broader than a deed, and if a conveyance of the homestead lot by deed does not forfeit the homestead right, but it still lives in the hands of the grantee, the same is true of a mortgage conveyance. Under the decision in *Adrian* v. *Shaw* the homestead right passes to the grantee of the homestead lot, and on to his grantee *ad infinitum* till the homestead right determines. It adheres like the shirt of Nessus and cannot be annihilated by mortgaging the homestead lot any more than by a direct conveyance of it. The homestead right therefore attaches still to the homestead lot in the hands of the purchaser. Whatever it is worth, he has it. It cannot be assessed or turned into money and divided out. It exists still, and is there. The proceeds of the sale are therefore, necessarily, the proceeds of the lot just in the same condition as the homesteader, if he had sold direct instead of through the medium of a mortgage, would hold the money. It is not protected by the homestead right. That has gone to the purchaser with the lot, and is still outstanding against the creditors. If the lot is protected from sale for Thornton's debts in the hands of the purchaser by virtue of Thornton's homestead right, which is imputed to him, how can this $1,000 be also withheld from the creditors? If the lot when sold had become subject to lien of judgment, then the proceeds would be exempt, but both the lot and the proceeds too cannot be exempt. The lot, with the homstead right attendant and appurtenant, is in the hands of the purchaser from the grantee (or mortgagee) of Thornton. The lot and the homestead right adherently are intact in his hands. This $1,000 must be something in excess and outside of the value of the homestead lot with the life-time exemption. It is, therefore, as held in *Gulley* v. *Thurston*, 112 N. C., 192, applicable to liens in their order, and as the plaintiff's judgment is an older lien than that of the mortgagees, the $1,000 is applicable to the judgment. The plaintiff's judgment lien could not be divested by the subsequent mortgages nor the sale under them, and could be asserted against the lot in whosoever hands it may be, when the homestead right determines. The plaintiff's claim against this $1,000 is by virtue of his lien on the excess. *Gulley* v. *Thurston*, *supra*. If a deed of the homestead lot does not forfeit the homestead exemption, but it passes, adherent to the lot, to the grantee, the conveyance by mortgage deed, and then by sale under the mortgage, necessarily cannot forfeit the homestead exemption, but it still exists in the hands of the purchaser, attached to the lot. The exemption still existing there, to protect the lot in the hands of the purchaser, the homesteader cannot claim another exemption in the $1,000 received from the sale of the lot. That would be to "eat his cake and have it too." To hold that the lot was exempt in the hands of the purchaser, and that the proceeds (which could be invested in another homestead) were exempt in the hands of the seller, would be to give the debtor two homesteads, which the Court has not yet done. And if the $1,000 would not be exempt in the hands of the seller it cannot be so, even temporarily, in the hands of his assignees, the mortgagees.

When this case was last here, 112 N. C., 196, the Court distinctly held with *Adrian* v. *Shaw* that a deed of a homestead lot conveyed to the purchaser the indestructible homestead right of the seller, which could not be severed from it. Logically, therefore, the Court must be deemed to have held that a mortgage, which is a conditional deed, and a sale under it, could not destroy the homestead right or dissever it from the homestead lot. The intimation to the contrary, given in the directions as to the distribution of the fund, as the subject was not yet in existence, was an *obiter* contrary to the ruling in *Adrian* v. *Shaw.* As was said (112 N. C., p. 207), "we should prefer to recall *dicta* which seem to be in conflict with that case."

As the "advantage," "right" or "estate" is assignable, and the purchaser of the lot holds that "advantage" (112 N. C., 210), it follows that the "advantage" does not at the same time reside in the $1,000 fund, and there is no statute and no decision and certainly nothing in the Constitution which authorizes its subtraction, even temporarily, from liability for the judgment debtor's debt, any more than for its permanent exemption.

Indeed, this case is on "all-fours" with and undistinguishable from *Allen* v. *Bolen,* at this Term. In that case, as in this, the homesteader was estopped by his deed from claiming the homestead exemption for himself. In that case also, as it should be held in this, the purchaser, under the lien of the prior docketed judgment, took the land in preference to the subsequently registered conveyance of the homesteader.

CITY NATIONAL BANK v. D. E. BRIDGERS et al.

Practice—Injunction—Receiver.

1. Upon an application for an injunction and receiver it is not necessary for the Judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief.
2. Where the insolvency of a trustee in a deed of assignment was questioned and it was positively alleged by the plaintiff, and the defend-

ants simply allege their belief that he was not insolvent; and, upon being required to give bond, the trustee refused so to do: *Held*, that it is proper to appoint a receiver to take charge of the assigned estate pending the litigation.

At August Term, 1893, of NORTHAMPTON Superior Court, his Honor *Bynum, J.*, upon the failure of the trustee to give the bond required, appointed a receiver to take charge of the assigned estate pending an action to set aside the deed for fraud. From this order the defendants appealed.

Messrs. *W. H. Day*, *Alexander Stronach* and *J. W. Hinsdale*, for plaintiff.

Mr. R. B. Peebles, for defendants (appellants).

MACRAE, J.: The complaint and answer are used as affidavits in the case on the application for an injunction and receiver. It was not necessary that the Judge below should "find the facts" further than to examine the affidavits and determine whether sufficient cause was shown for the ancillary relief sought pending the action. In proceedings of the present nature this Court in the exercise of its equitable jurisdiction is required to pass upon the facts as well as the law. *Jones* v. *Boyd*, 80 N. C., 258. A serious controversy exists between the parties to this action, involving the *bona fides* of a deed of assignment made by defendants Garris & Bridgers to J. D. Bottoms; the insolvency of the trustee is positively averred by plaintiff and the defendants simply allege their belief that he is not insolvent. His Honor required him, for the protection of the estate, to give bond in $1,000, and upon his refusal to give such bond appointed a receiver. No questions as to exemptions were necessary to be determined in this order made for the preservation of the property or fund pending the litigation; it is now in the hands of an officer of the Court and all these matters may be determined in good time.

This is not a case in which a specific denial of the allegations in plaintiff's affidavit would entitle the defendants to a dissolution of the restraining order. The practice is so well settled now that it will be unnecessary to cite authorities.

Affirmed.

CITY NATIONAL BANK OF NORFOLK v. J. B. BRIDGERS et al.

Fraudulent Conveyance—Dealings Between Brothers—Burden of Proof.

1. The existence of near relationship between parties to a suspicious transaction often constitutes additional evidence of fraud for the jury, but, in the trial of an action to set aside a conveyance on the ground of fraud, it was error to instruct the jury that proof of the existence of near relationship between a grantor and grantee named in a deed amounts to a *prima facie* showing of fraud so as to make it incumbent on the parties upholding the deed to offer affirmative testimony to show good faith or submit to a verdict on an issue of fraud.
2. In the trial of an action to set aside as fraudulent a deed of trust from one brother to another it is in the sound discretion of the trial Judge to permit counsel to comment on the failure of the defendant to introduce as witnesses other parties to the transaction.

ACTION to declare deed void for fraud, and to sell property (therein conveyed) under order of Court to pay plaintiff's debt, and to restrain trustee from disposing of the same pending the litigation, heard at December Special Term, 1893, of NORTHAMPTON Superior Court, before *Whitaker, J.*, and a jury.

It appeared in evidence that on the 22d day of June, 1893, the defendant J. B. Bridgers and his wife made a deed of conveyance, absolute in form, conveying to his brother, W. K. Bridgers, certain property, and that said deed was duly registered on the next day, the consideration for said conveyance being $3,000; that on the 24th June, 1893, the said W. K. Bridgers and his wife reconveyed said property to said J. B. Bridgers, the consideration mentioned in said deed being $10, this deed being registered 29th June, 1893; that Garris & Bridgers (the Bridgers of this firm being another brother of said J. B. Bridgers) on the 24th June, 1893, made a deed to J. D. Bottoms, the defendant, conveying certain property in trust to pay certain indebtedness of Garris & Bridgers, said deed being duly registered on the 29th June, 1893, and that on the 24th June, 1893, the said J. B. Bridgers and his wife made a deed to defendant J. D. Bottoms, conveying a part of the property conveyed in the two first mentioned deeds in trust to sell and out of the proceeds to pay a certain note of $700, given by W. K. Bridgers to J. B. Bridgers, to enable him to borrow money, and indorsed by J. B. Bridgers, and an account due by said J. B. Bridgers to Garris & Bridgers.

It further appeared in evidence that this note of $700 had been indorsed by J. B. Bridgers to the plaintiff as collateral security for a certain note of $800, due by said J. B. Bridgers, the same being a part of the indebtedness mentioned in complaint of plaintiff. The plaintiff introduced in evidence these two notes of $700 and $800.

The plaintiff in this action sought, among other things, to have the deed of 24th June, 1893, by J. B. Bridgers to John D. Bottoms declared fraudulent and void as to creditors.

The plaintiff introduced in evidence the last and other deeds above mentioned.

Many issues were submitted to the jury, all of which were answered by consent except the first, to-wit: "Was the deed from J. B. Bridgers to J. D. Bottoms, dated June

24, 1893, made with the intent to hinder, delay and defraud the creditors of J. B. Bridgers?"

It was admitted by the parties, in open court during the examination of witnesses, that at the time of making the deed by J. B. Bridgers to J. D. Bottoms, which plaintiff sought to have declared fraudulent as to creditors, the said J. B. Bridgers had property besides that mentioned in this deed sufficient to pay his debts.

Counsel for plaintiff, in his argument to the jury, commented upon the fact that the defendant J. B. Bridgers had not been brought to court and introduced as a witness in behalf of the defendants. To this the defendants then and there objected. The Court permitted the counsel for plaintiff to continue with his comments of this nature, and the defendants excepted.

The counsel for plaintiff also commented on the fact that W. K. Bridgers, who was then, and was during the progress of the trial, in court, had not been examined as a witness in behalf of defendants; and to this the defendants then and there objected, and, upon the Court's permitting said counsel to continue his comments as aforesaid, excepted.

The Court instructed the jury that the only issue which was submitted to them for their consideration and answer, all the others having been answered by consent, was the first: "Was the deed from J. B. Bridgers to J. D. Bottoms, dated June 24, 1893, made with intent to hinder, delay and defraud the creditors of J. B. Bridgers?" That if they found that W. K. Bridgers, who signed the note indorsed to plaintiff by J. B. Bridgers and secured by deed in trust, and the Bridgers of the firm of Bridgers & Garris were brothers of J. B. Bridgers, then the law looked with suspicion on the transaction, and it was incumbent on the defendants to establish the debts secured by the trust, or a sufficient number of them, to satisfy the jury that the deed was not intended as a colorable security for fictitious debts, but was made to the intent of honestly securing real debts. To this the defendants then and there excepted.

The jury answered the first issue, "Yes."

The defendants moved the Court to set aside the verdict as to the first issue, because of the Court's permitting counsel for plaintiff to comment upon the non-introduction of J. B. Bridgers and W. K. Bridgers as witnesses for defendants, and because of the instructions of the Court to the jury as hereinbefore stated.

The Court, being of the opinion that it erred in permitting the comments of counsel and in its instructions to the jury as hereinbefore stated, set aside the verdict of the jury as to the first issue and directed a new trial as to this. This was done by the Court not in the exercise of its discretion, but as a matter of law.

The plaintiff excepted and appealed.

Messrs. W. H. Day, *J. W. Hinsdale* and *Alexander Stronach*, for plaintiff (appellant).

Mr. R. B. Peebles, for defendants.

AVERY, J.: Persons standing in the relation of parent and child or of brothers "may deal with each other in good faith just as others not so related may do." In such cases the presumption of fraud may arise where an insolvent person conveys valuable property to a near relation for less than its reasonable value, if the transaction is witnessed only by the parties and persons so related and they withhold explanation by refusing to go upon the stand and testify. *Banking Co.* v. *Whitaker*, 110 N. C., 348; *Helms* v. *Green*, 105 N. C., 264; *Brown* v. *Mitchell*, 102 N. C., 372; *Reiger* v. *Davis*, 67 N. C., at page 189.

The doctrine applicable in such cases is founded upon a familiar and recognized rule of evidence. "When effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption" (says Best in his work on Evidence, p. 277) "that those facts if produced would make against him." Generally where parties withhold evidence which it is exclusively within their power to produce "the law puts the interpretation upon such conduct that is most unfavorable to the suppressing party." It is the willful or negligent failure to furnish evidence under his control and not accessible to his adversary, not the relationship of the parties, that calls for explanation. Wharton on Evidence, secs. 1266 to 1269; *Helms* v. *Green*, *supra*. The existence of near relationship between parties to a suspicious transaction often constitutes additional evidence of fraud to be weighed by the jury. But in the case at bar the inquiry was whether a deed of assignment made by J. B. Bridgers on the 24th of June, 1893, to the defendant J. D. Bottoms as trustee, conveying certain property to secure the alleged indebtedness of the grantor or assignor to Bridgers & Garris, was in fact executed not in good faith, but to hinder, delay and defeat the claims of the creditors of said J. B. Bridgers. The evidence of the successive transfers of property among the members of his family was admitted without objection and went to the jury with other circumstances bearing upon the main issue as to the character of the conveyance to Bottoms. But upon no known principle of evidence could we hold that any suspicious circumstances attending other distinct transactions would shift the burden of proof or make it incumbent upon the jury to find that the Bottoms deed was executed with intent to defraud in the absence of explanation. The deed of assignment was not shown to have been executed in a secret family conclave. It does not appear from the record that Bottoms sustained any nearer relation certainly than that of a trusted friend, nor can we conclude without evidence that there was any secrecy in the execution of a paper which was registered a few days later. "It was admitted by the parties in open court during the examination of witnesses that at the time of the making of the deed by J. B. Bridgers to J. D. Bottoms, etc., the said Bridgers had property besides that mentioned in the deed sufficient to pay his debts." So that there was no proof of a secret transaction between relations or of a withholding by them of explanations as to matters peculiarly within their knowledge and bearing upon the issue. If the grantor retained property sufficient and available to satisfy all of his debts the deed could not (nothing more appearing) have been declared fraudulent, had it been a voluntary conveyance to the grantor's child instead of an assignment to a stranger for the benefit of creditors.

In both of the paragraphs of the complaint in which the financial status of J. B. Bridgers is mentioned the plaintiff alleges not that he was, when the deed was executed, but that "he is" (now, at the date of verifying the complaint) insolvent. The equivocal denial of that allegation in the answer is tantamount to an admission, but is not at all inconsistent with the other admission made on the trial, that at the previous date of the deed of assignment Bridgers retained property sufficient to pay his debts. It is not strange or unusual for persons, by some unwise step or unfortunate deal, to sacrifice in a day the best financial standing and become suddenly not only insolvent but hopelessly bankrupt. The instruction given by the Court in so far as it declared the relationship of the trustor and *cestui que trust*, as an abstract principle, was certainly correct, if not so in its application to the circumstances of this case.

But it was error in this or any other case to lay down the broad proposition that the proof of the existence of near relationship between a grantor or assignor and the grantees or beneficiaries named in a deed amounts to a *prima facie* showing of fraud, so as to make it incumbent on the parties upholding the deed to offer affirmative testimony to show good faith or submit to a verdict against them on an issue of fraud. In order to exclude any conclusion to the contrary we deem it proper to say that the ruling of the Judge below in the first instance, that it was within the sound discretion of the Court to permit counsel to comment on the failure to offer J. B. Bridgers and W. K. Bridgers, was correct, and if the setting aside of the verdict had depended solely upon the soundness of that view of the law it would have been error to grant the new trial. *Hudson* v. *Jordan*, 108 N. C., 10.

For the reasons given we think that the Judge erred in the instruction given as to the effect of the evidence and very properly corrected the error before the matter passed beyond his control. Judgment Affirmed.

STATE ex rel. FOSTER JOYNER v. E. E. ROBERTS et al.

Trial—Question for Jury—Register of Deeds—Marriage License.

1. What is negligence and what is reasonable diligence are, when the facts are ascertained, questions of law to be declared by the Court; therefore, in an action against a Register of Deeds for wrongfully issuing a marriage license, it was error to leave to the jury the question whether the defendant made reasonable inquiry as to the age of the female.

2. A Register of Deeds who issues license for the marriage of a female under eighteen years of age, after being informed and believing that her father is dead and after obtaining the written consent of her mother, will be considered as having made such reasonable inquiry as contemplated by the statute.

ACTION on the official bond of E. E. Roberts, as Register of Deeds for Northampton county, for the penalty of $200 given by section 1816 of *The Code*, commenced February 20, 1892, and tried at August Term, 1893, of NORTHAMPTON Superior Court, before *Bynum, J.*

It was admitted that on the 21st day of January, 1890, the defendant issued a license for the marriage of Ida Joyner, daughter of Foster Joyner, to Charles Lewis, and that under the license the parties were married, Ida being under eighteen years of age, which was known to Roberts before and at the time the license was issued.

A witness for the plaintiff testified that Foster Joyner had been absent from home ten or twelve days when the license was issued, and said, on cross-examination, after objection, that there was a rumor in the neighborhood that Foster was dead.

Joyner testified that he gave no written or other consent to the marriage; that he had been away from home eleven days, and all knew he was not dead.

The defendant testified for himself that he refused to issue the license to the one who applied for it because he did not have the written consent of the father or mother. The applicant told him that the girl had no father, and witness filled up a blank written consent with the name of the mother. The applicant took it off and came back next day with the paper signed by the mother, and the license was issued. The applicant, Futrell, was a man of good character, and witness issued the license because he believed that the girl had no father. Witness did not recollect whether he had examined the census reports as to the girl's age or not.

Jackson Futrell testified that he witnessed the signing of the written consent by the girl's mother, and gave it to the Register; that he applied for the license and told the Register that the girl was sixteen or seventeen years of age; defendant said he could not give the license; no one knew where Foster Joyner was at the time, but it was generally reported that he was dead. He had been gone about two weeks when witness applied for license.

The plaintiff asked the Court in writing to instruct the jury:

"1. That if the jury believe that Foster Joyner, the father of Ida, and with whom Ida lived, was absent on a visit of two weeks to his brother in Hertford county, then the written consent of the mother was no compliance with the statute, and the plaintiff is entitled to recover $200 of defendants.

"2. That if the jury believe the evidence the plaintiff is entitled to recover of the defendants the sum of $200."

Both of said prayers were refused, and plaintiff excepted.

His Honor charged the jury as follows:

"Does the evidence satisfy you that the defendant Roberts, as to the age and parents of Ida Joyner, made such inquiry as would have satisfied a man of reasonable prudence in the transaction of an important business matter, and was his information, coming from the source it did, such as would have satisfied a man of reasonable prudence of its truth and induced him to act on it in a business matter of importance? If so, and the defendant Roberts did act upon it in issuing the license, then the jury should find the issues in favor of the defendants."

To this charge the plaintiff excepted.

There was a verdict finding all the issues in favor of the defendants. A motion by plaintiff for a new trial and from the refusal the plaintiff appealed.

Mr. R. B. Peebles, for plaintiff (appellant).
Mr. B. S. Gay, for defendants.

PER CURIAM: There was error on the part of the Judge in leaving the question of reasonable inquiry to the jury. *Emry* v. *Railroad*, 109 N. C., 589. As the case goes back for a new trial it is proper to say that if the circumstances testified to by the defendant and the witness Futrell are true, then, under our authorities, the defendant would have made such reasonable inquiry as is contemplated by the statute. New Trial.

MATTIE M. TATE v. THE CITY OF GREENSBORO et al.

Municipal Authority—Control of Streets—Right to Cut Down Shade Trees—Street Committee—Damnum Absque Injuria.

1. A city has exactly the same rights in and is under the same responsibilities for a street which it controls by dedication only as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned.
2. The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid.
3. The charter of the city of Greensboro and the general law of the State (*The Code*, ch. 62, Vol. II) give to the municipal authorities of that city wide discretion in the control and improvement of its streets, and if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria.*

4. The Courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion.
5. The power given to a city over the streets can be delegated to a street committee composed of members of the Board of Aldermen, and the members of such committee, acting as such and within the limits of the power of the city, are not answerable, individually, for damage resulting from their acts.

(AVERY, J., dissents *arguendo*, in which MACRAE, J., concurs).

This was a CIVIL ACTION, tried before *Connor, J.*, and a jury, at August Term, 1892, of the Superior Court of GUILFORD County.

By consent of the parties the Court found the facts upon the pleadings and the testimony, submitting to the jury the issue in regard to damages. It was agreed that if, upon the facts as found, the Court should be of the opinion that the defendants or either of them were liable, judgment should be rendered in favor of the plaintiff and against such defendant or defendants for the sum of $300, with interest from the ---- day of August, 1892, and costs, the said sum being the amount of damages assessed by the jury, otherwise the verdict should be set aside and judgment be rendered against the plaintiff for costs. Pursuant to said agreement the Court found the following facts:

The plaintiff on the 3d day of August, 1891, and for several years prior thereto; was and had been the owner of and with her husband resided upon a lot in the city of Greensboro situated on Ashboro street, adjoining the lots of W. R. Murray and others and bounded as follows (as described in the complaint).

That Ashboro street was on said day, and had been for several years prior thereto, a public street and highway in said city of Greensboro, held and maintained as such and used by the citizens of said city to pass and repass on foot and in vehicles and worked upon by the street force in the employment and under the control and directions of the authorities of said city. That prior to the plaintiff's purchase of the said lot the owner thereof had dedicated to the said city, as and for a public street, the land upon which the trees hereinafter referred to were standing and growing, together with the space of from five to six feet for a sidewalk; that the plaintiff after the purchase and at the suggestion of some adjoining land owners set the fence back two and a half feet, thus making the sidewalk eight feet wide; that on the outer edge of the sidewalk, and within the line of the curbing in front of the plaintiff's said lot and dwelling-house situated thereon, there was standing on and before the said day, and at the time of plaintiff's purchase of said lot, three oak trees of considerable size, which cast shade upon said dwelling-house and lot, contributing to the comfort thereof as a dwelling-place; that the leaves on the said trees obstructed the rays of the sun and so shaded the street as to cause the same for a portion of the time to be and continue damp; that there was near the front gate of the plaintiff's lot, before the said trees were removed as hereinafter set forth, a hole formed by a depression in the soil, in which mud and water stood and at times created an offensive odor, which was increased by green limbs and leaves thrown into said mud-hole by directions of the street force of said city; that on the said 3d day of August, 1891, the space between the said trees and the plaintiff's fence was not uniform for the entire length of said fence, but averaged about eight feet, being at no point less than seven feet, and afforded room for persons to pass in the usual manner upon said sidewalk without inconvenience; that by section 60 of the charter of the city of Greensboro (see Laws of 1889, Private Acts, ch. 219) it is provided that the Board of Aldermen shall have power to grade, macadamize and pave the streets and sidewalks, and to lay out, change and open new streets or widen those already open and make such improvements thereon as the public convenience may require; that section 12, ch. 1, of the ordinances of the city of Greensboro provides: "There shall be appointed by the Mayor at the first regular meeting after organization in May eight standing committees of four members each, as follows, to-wit: * * * street committee." Section 13 of the said ordinances provides: "The street committee shall have control and supervision of all matters relating to the streets, sidewalks and pumps of the city, and shall determine the amount of labor and material to be used * * * and shall report to the board from time to time, and perform all other duties imposed upon them by the Board of Aldermen."

That pursuant to the provisions of the ordinances above set forth the defendants J. L. King and H. L. Scott, together with J. D. Glenn and J. R. Mendenhall, were duly appointed a street committee for the year 1891; that complaint having been made to the said street committee by some of the citizens of said city respecting the condition of said street, the defendants King and Scott severally conferred with J. R. Mendenhall, and they concurred in the conclusion that the said trees should be removed. No formal meeting of the said committee was called or held in regard to said matter.

That pursuant to said conclusion the defendants John L. King and Hugh L. Scott directed the said street force of said city to remove the said trees, and on the said 3d day of August, 1891, the said street force began the removal of said trees by digging them up by the roots and concluded the work in two or three days. The trees were cut into logs and placed in the plaintiff's yard. The husband of the plaintiff was present and objected to the removal of said trees, and notified the defendants that they would be held responsible therefor. That no action was taken or order made by the Board of Aldermen in respect to the removal of said trees, nor was any report made by the said street committee to the said Board in regard to their action in the premises; that after the removal of the trees the mud-hole was filled in by the city authorities with rock and the street so improved that it is now in good condition. The hole could have been filled in without removing the trees.

The Court, upon the foregoing facts, being of the opinion that the plaintiff was not entitled to have and maintain her action, directed the verdict rendered by the jury, whereupon the plaintiff submitted to a nonsuit and appealed.

Messrs. R. M. Douglas, L. M. Scott and *J. A. Barringer*, for plaintiff.

Messrs. Dillard & King and *James E. Boyd*, for defendant.

BURWELL, J.: It is contended by the plaintiff, first, that even admitting that the act of which she complains—the destruction of shade trees standing on the outer edge of the sidewalk in front of her residence in the city of Greensboro—was done by the duly authorized agents of that municipal corporation, she is still entitled to recover for the damage done to her property by the cutting down of these trees, because his Honor has found that they did not obstruct the passage of persons on the sidewalk; that the public convenience did not require their destruction, and that the "mud-hole" in the street, for the removing of which this act seems to have been done, could have been remedied without cutting them down.

This phase of the case presents for our consideration this question: Can the Courts review the exercise by the city of Greensboro of its power to repair and improve its streets and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city, which the municipal authorities honestly believed were injurious and obstructive to the public, were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?

The street in which these trees stood was dedicated to public use as a street by those under whom the plaintiff claims title. Holding control of this street by reason of its dedication only, the city, nevertheless, has exactly the same rights therein and responsibilities therefor as if it had been by deed of the owner conveyed to the corporation for use for street purposes, or had been condemned and taken for those purposes according to the provisions of the charter. And the rights of the plaintiff therein are no greater than if it had been so conveyed or so condemned and taken. Now the responsibilities that counties and townships assume, or are put under by the law, in relation to their highways is very different from those of cities and towns in relation to their streets. It is required that roads shall be kept in repair, and certain individuals, upon whom is cast in one way or another the burden of seeing that these repairs are made, can be indicted for failing to perform this duty, but the municipality (county or township) is not held liable for damages that may result from the roads being out of order or obstructed. Cities and towns, however, are held to strict pecuniary accountability for the condition of their streets. They are not political divisions of the State, made by it for convenience in its government of the whole, but are corporations chartered presumably at the request of the inhabitants, and granted privileges and charged with corresponding responsibilities. Among the very gravest of the pecuniary responsibilities that the law imposes on cities and towns is liability for damages to persons and property caused by a defective or improperly obstructed street. *Bunch* v. *Edenton*, 90 N. C., 431; *White* v. *Commissioners, Ibid*, 437. Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. Illustrative of this is the provision of *The Code*, §3803, that the commissioners of towns "shall provide for keeping in proper repair the streets and bridges of the town *in the manner and to the extent they may deem best.*" We think that under its charter and under the general law of the State (*The Code*, ch. 62, Vol. II) the city of Greensboro was clothed with such discretion in the control and improvement of its streets, and if damage comes to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*. *Smith* v. *Washington*, 20 How., 135; *Brush* v. *City of Carbondale*, 78 Ill., 74; *Pontiac* v. *Carter*, 32 Mich., 164.

It is not to be denied that the abutting proprietor has rights as an individual in the street in his front as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are in a restricted sense his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them he may recover damages of such individual. His property in them is such that the law will protect it from the act of such a wrong-doer and trepasser. *Bliss* v. *Ball*, 99 Mass., 597, and *Graves* v. *Shattuck*, 35 N. H., 257 (69 Am. Dec.), are illustrations of this principle. In the former case the Court, speaking of the injury done by defendant to the trees in the street in front of plaintiff's lot, said: "If the defendant thought they were a nuisance, he might have complained to the selectmen, and it was for them to decide the question whether they should be removed. * * * The defendant had no authority to remove them, nor were the jury authorized to decide the question whether they ought to remain"; and thus that authority seems abundantly to sustain the position that it is not for a Court and jury to review the conduct of the proper municipal authorities in such a matter as that now under consideration. In *Barnes* v. *District of Columbia*, 91 U. S., 540, it is said: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades and the opening of new and the closing of old streets are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The wisdom of this rule is well illustrated by this action. Complaints were made, it seems, by citizens that these trees were injurious to the public way and, in their effects, perhaps, to the public health. The proper authorities of the city, clothed with the power to repair the streets and protect the public health, listened to these complaints, and in the exercise of their best judgment, so far as appears, decided that the interest of the community required their removal. The proposition of the plaintiff is that a jury shall judge of the correctness of this conclusion, and if they find that the officials committed what they think was an error, they and the city shall be mulct in damages. "The maintenance of such an action would transfer to

Court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints." Cooley Const. Lim., 255 (6th Ed.).

Phifer v. *Cox*, 21 Ohio St., 248, which plaintiff's counsel cited in their brief, related to a county road, and the alleged wrongful cutting of plaintiff's hedge was done by a private citizen. So it has no application, we think, to this case, and belongs to the same class of decisions as *Graves* v. *Shattuck* and *Bliss* v. *Ball, supra.*

Bills v. *Belknap*, 36 Iowa, 583, also cited, relates to the cutting down of trees standing in a highway in the country, and the action was to restrain the supervisor of the road. In *Everett* v. *City of Council Bluff*, 46 Iowa, 66, also relied on by plaintiff, which was a suit to enjoin the defendant from cutting down certain shade trees in front of plaintiff's lot, the petition alleged that the trees were "perfectly safe and sound and afforded no obstruction to the free use of the street and sidewalk," and stated reasons why they should not be removed. The defendant made no answer, and as the Court said the allegations of the petition were taken as true, and so it appeared by the admission of the defendant that its officers were about to do, under its orders, a wrong to the plaintiff, which, because it conceded that the public interest did not in any way require it to be done, would be wanton and unnecessary. We think that case is clearly distinguishable from the one now under consideration.

The principles which govern in this matter are well stated in *Chase* v. *City*, 81 Wis., 313 (51 Northwestern Rep., 560), an action for damages for cutting down shade trees, very similar to the one we are considering, from which we make the following quotation: "The right of the public to the use of the street for the purposes of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to the entire width, and whether it will so open and improve it, or whether it should be opened or improved, is a matter of discretion to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities Courts cannot ordinarily interfere upon the complaint of the lot owner so long as the easement continues to exist. * * * The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner no action can be maintained against the city."

Having shown, as we think, that the plaintiff cannot recover of the city, we come to consider her second proposition—that she can recover damages of "the other defendants, King & Scott, not as the servants or agents of the city, but as independent tort feasors," as it is stated in the brief of her counsel. In other words, it is proposed that the cause of action as against the city shall be abandoned, and the cause proceed against the other defendants upon the theory that they had no authority from the city to do the act complained of.

We think the power given to the city over the streets could be delegated to a street committee composed of members of the Board of Aldermen, as this one was; that this action was the action of that committee, and therefore of the city, and that just as these individals would have been answerable in damages to the plaintiffs, if the act had been beyond the power of the municipality, so they are not liable if the act was within those powers. All went to show that the individual defendants were acting as agents and officers of the city. They so assert. The city so insists, and distinctly ratifies their act. Therefore, as the city has done no legal wrong, neither have they.

Affirmed.

AVERY, J., dissenting: It is always safe to recur to fundamental principles. It is perilous to refrain from going to the fountain-head where the controversy arises out of an attempt of a public agency to use or destroy without compensation what is claimed to be private property. The very question involved in the case at bar is, What are the rights respectively of the servient and dominant owners—the town and the abutting proprietor in a street—what passed to the public with the easement and what residuary interest remained in the owner after the appropriation by the municipality for corporate purposes? The taking of private property for a public highway, like any other exercise of the right of eminent domain, can be justified only on the ground of public necessity—that it is essential, in order to subserve the convenience or promote the prosperity of the great body of people comprehended under the general designation of the public, to give them the use of it for certain specified purposes. Cooley Con. Lim., 643. Where an easement is acquired, whether by grant, dedication or condemnation, nothing more passes to the public than the power to use the land strictly in furtherance of the objects for which the Legislature authorized its appropriation. Except in so far as his right of enjoyment is restricted by the inhibition against his interference with its use for the particular public purposes, all of the rights of ownership are still retained by the holder of the servient tenement. The other estate dominates and overshadows his right only so far as is necessary to subserve the ends for which its privilege has been granted.

The residuary rights of the abutting owner in a street are somewhat more restricted than those of an adjacent proprietor in a public road, because, in contemplation of law, the damages for the taking are measured by the extent of the public use and the consequent limitation of private enjoyment by the servient owner.

I may safely lay it down as a general proposition that when the Legislature permits private property to be taken by a public or quasi-public corporation the State intends that it shall be appropriated only for corporate purposes—such uses as may be necessary in order to enable the public agency to perform its duties to the State and enjoy the compensatory privileges granted to it. Whatever rights of property in streets do not pass, from the very nature of a municipality, as necessary to the discharge of its public functions or as inseparable incidents to the franchise granted, remain in the abutting proprietor, reserved by implication of law for his benefit, whether the city or town has acquired the fee or an easement either by grant, dedication or condemnation, and whether the line of such abutting owner extends to the margin or middle of the street. The abutting proprietors have a qualified property in a street which entitles them to make "any beneficial use of the soil of such highway which is consistent with the prior and paramount rights of the public therein for street purposes proper." 2 Dillon, sec. 656*b*. "If they own the fee to the center line of the streets" (says Judge DILLON) "their rights therein are legal in their nature. If they own the fee to the line of the streets their rights in the street are in the nature of equitable easements in fee, but in extent are substantially the same as when the fee is in them subject to public use." *Ibid.*, secs. 663, 664, 661; *Bliss* v. *Ball*, 99 Mass., 597. "Where one's land is bounded on a public highway" (says Judge COOLEY in his work on Torts, p. 317) "it presumptively extends, not to the outer line, but to the middle of the road, and his supreme dominion embraces the whole, qualified only by the public easement." In this respect there is a striking analogy between abutting and riparian owners of the fee, in that a certain incidental qualified property attaches in the highway, whether it be a public road or navigable water. *Bond* v. *Wool*, 107 N. C., 139; *Yates* v. *Milwaukee*, 10 Wall., 497. The street consists of the carriage way and sidewalk, the enjoyment and use of both of which are recognized by the Courts as the right of the abutting proprietor, of which he cannot be deprived by the municipality or even by the Legislature without his consent and without adequate compensation. *Moose* v. *Carson*, 104 N. C., 431; *State* v. *Brown*, 109 N. C., 802. A municipal corporation though authorized by statute to widen streets can do so only where some mode of ascertaining the damage done by taking additional land and of enforcing its payment is prescribed by law and pursued by the corporation. On the other hand, a city or town has no right to sell a portion of a street in front of an abutting owner or to diminish its width in any way without compensation and contrary to his wishes. *Moose* v. *Carson*, *supra*. It being conceded that the abutting owner has a qualified property in the street on his front, the only safe criterion by which to test the justice of a claim to any specified right is the consistency or inconsistency of its exercise with the use of the highway by the municipality for corporate purposes. The original owner of the soil surrenders his absolute property in his frontage for a qualified one in full contemplation of the authority of the corporation whenever it may become necessary for public purposes either to elevate or lower the level of the street, though he may suffer some inconvenience from any alteration of the grade, and consequently it is supposed that such damage was considered when the cost of the easement was estimated and paid or that a donation was made, subject to the contingency of suffering such loss.

Guided by the principles stated, this Court held that for loss caused by excavation on embankments made in changing the grade of a street the abutting owner could not recover unless the injury was directly due to want of skill or negligence in the excavation of the work. *Meares* v. *Wilmington*, 9 Ired., 73; *Wright* v. *Wilmington*, 92 N. C., 156.

In such cases it was considered that the alteration in the highway was not a new taking, but a use of it that was in contemplation at the time when the easement passed to the public. Cooley Con. Lim., p. 671; 2 Dillon, sec. 992, and note. Even this rule, however, has proven so oppressive in practice as to lead in some of the States to the enactment of statutes and the amendment of constitutions so as to create a liability as for an original taking, when there is a change of grade such that damage ensues to an adjacent proprietor. Lewis on Em. Domain, ch. 8, especially sec. 221.

"The public," says Mr. Lewis, "acquire no right in the use of springs in the highway and cannot divest them for the purpose of making a public watering-place. The owner of the land cannot change the location of the road when it crosses his land. He may deposit materials on the surface of the way, plant shade trees or ornamental trees therein, set hitching posts, etc. * * * The public cannot place structures on the soil which have no connection with its use as a highway." Lewis on Em. Domain, p. 759; *Deaton* v. *The County of Polk*, 9 Iowa, 594. "Subject to the paramount right of the public the rights of the owner of the fee remain the same as though the public easement did not exist. * * * As against the public he may make any use of the land which does not interfere with the use and enjoyment of the same as a highway." *Ibid*, sec. 589, p. 758. The learned author claims for the owner of the fee the right to plant trees in the highway both for shade and ornament, and it cannot be denied that he acquires a qualified property in the fruit of his labors when they grow so as to subserve his purpose. It is conceded to be the law in North Carolina that such shade trees can be cut down by a city when the grade is changed, because they are planted in contemplation of the principle that the power to grade is a continuing one, and that "of the necessity or expediency of its exercise the governing body of the corporation, and not the Courts, is the judge." 2 Dillon, sec. 686 and note.

But though a tree be planted subject to the right of the city to destroy it in the exercise of this continuing power to improve its streets, it is nevertheless the property of the owner of the fee, and when no change of grade is ordered the governing authorities of the town have the right to remove it only on the ground that it obstructs the highway and is therefore a public nuisance, or after condemnation and the payment of compensation ascertained in a mode pointed out by law.

Mr. Wood, in his work on Nuisances, section 294, not only agrees with such other able and discriminating text-writers as Judge DILLON in declaring that the adjacent owner has a property in trees planted in his front, but in maintaining that the municipal authorities are responsible if they deal with them as nuisances, when in fact they do not interfere with the ordinary use of the streets and sidewalks. He says: "Shade trees set in a street or highway without authority of law, which in any measure obstruct travel, are a nuisance. * * * But they can be removed only by the owner or the public authorities, and if they (the public authorities) remove them when they do not obstruct travel they are liable to the owner in damages therefor." See also, *Clark* v. *Doseo*, 34 Mich., 86. If damage can be recovered it must *ex necessitate* be assessed by a jury, since it will not be contended that it is a taking in the exercise of the right of eminent domain for which the law provides any other mode of fixing the compensation.

Thus we find that all of the leading text-writers concur in construing the decisions which I cite to sustain my view, and to have settled the principles in this country generally that a shade tree is the property of the abutting owner which cannot be destroyed as a nuisance unless it hinders the free use of the highway by the public, and where it is not an obstruction the owner may recover damages of the authorities of a city for its wrongful removal. In treating of the power to prevent and abate nuisances Judge DILLON says: "This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its counsel to act upon that which comes within the legal notion of a nuisance, but such power conferred in general terms cannot be taken to authorize the extra judicial condemnation and destruction of that as a nuisance which in its nature, situation or use is not such. * * * It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws of the city or of the State within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved or even by the city

itself." *Everett* v. *City of Council Bluffs*, 46 Iowa, 66; 1 Dillon, sec. 374; *Yates* v. *Milwaukee*, 10 Wallace, 498; *State* v. *Jersey City*, 29 N. J. Law, 170; Cooley Const. Lim., 242, 741, note; *State* v. *Mott*, 61 Md., 297; *Ward* v. *Little Rock*, 41 Ark., 526; *Fertilizer Co.* v. *Hyde Park*, 70 Ill., 634; How & B. Mun. Corp., sec. 252.

If the destruction of the tree complained of is to be imputed to the defendant it is not contended that there was any other law authorizing the act than the general authority to prevent nuisances. Whether a city acts in such a case as this under the general power to abate nuisances or under special authority to remove obstructions, the rule is the same. "Power to a city to regulate the use of streets and alleys and to prevent and remove obstructions from them contemplates the preservation of *actual ways* against *nuisances which interfere with their accustomed* use, and until they have become actually open obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be dealt with under an ordinance in the municipal tribunal, but the *rights of the parties must be determined in the public courts.*" 2 Dillon, sec. 680, p. 809, and note; *Jackson* v. *People*, 9 Mich., 111; *Phifer* v. *Cox*, 21 Ohio, 248.

While in the exercise of the continuing authority to raise or lower the grade of streets the law requires of the city only good faith, care and skill, the arbitrary destruction of property or what is equivalent to its confiscation cannot be justified on the ground that the act was done under the honest belief that it was a lawful abatement of a nuisance because it obstructed the highway. If the tree was property and was not planted in contemplation of legal authority in the city, express or implied, to cut it down at will, but only in view of the possibility of its destruction as a nuisance, then unquestionably the plaintiff would have the right to have any disputed facts, such as the question where the tree was standing, tried by a jury, with instruction from the Court as to what constituted nuisance such as the city might summarily abate. Good faith will not protect an officer who commits a trespass without the color of authority and thereby leave remediless one whose property is destroyed without reason or necessity. Elliott on Roads and Streets, p. 521.

An obstruction is defined as "anything which, without reasonable necessity, impedes the use of the streets for lawful purposes." Horr & Bemis Mun. Pol. Ord., sec. 230. "When adjacent owners retain the fee in the streets *the corporation has no right to destroy the trees,* unless they grow within the street or so as to obstruct traffic." Horr & Bemis, sec. 229; *Bliss* v. *Ball*, 99 Mass., 597; *White* v. *Godfrey*, 97 Mass., 472; *Tortor* v. *Morristown*, 19 N. J. Eq., 46; *Cross* v. *Morristown*, 18 N. J. Eq., 313; *Bills* v. *Belkry*, 36 Iowa, 583; *Everett* v. *Council Bluffs*, *supra*.

Whether trees in a public highway are a public nuisance "is a question of fact for the jury" in all cases. *Phifer* v. *Cox*, 21 Ohio, 248. If an overseer cuts down a tree which does not obstruct or interfere with the public use of the road he is a trespasser, and if he does so maliciously is liable to exemplary damages. *Winter* v. *Peterson*, 4 Zabriskie (N. J.), 524.

The case of *Chase* v. *City*, 6 Am. R. and Corp. Cases, 1, may appear upon first view of it to be in conflict with the general current of authority and with the cases we have cited, some of which are collated in a note appended to it; but upon a closer examination it will appear that the opinion rests upon the ground that the common council are by special provisions of the charter to "protect the streets from any encroachment or injury," and "to prevent, prohibit and cause the removal of all obstructions in and upon all streets in said city."

The charter of the city of Greensboro provides for condemnation of property for the purpose of changing or widening the streets already in existence and laying out new ones, but we find no special warrant for assuming the judicial function of declaring any obstruction in the whole street a nuisance. If the Legislature had constituted the Mayor and commissioners, or the street committee selected by them, a special court and had empowered them to remove obstructions which, in their judgment, were nuisances, we would still have been compelled to meet the question whether the Legislature could in that indirect way clothe the officers of a municipality with the authority to destroy such private property and deprive the sufferer of the right to "the ancient mode of trial by jury" guaranteed to him "in all controversies respecting property" by the Constitution (Art. I, sec. 1), unless the trees had been planted in contemplation of an express power conferred upon the town council to clear all parts of the streets of trees. This grave question does not arise in this case and the discussion of it is therefore unnecessary. When the point shall be properly presented it will be necessary to determine whether the Legislature can dispense with the right of trial by jury in any case involving the title to property when the litigant could have claimed it under the ancient common law.

It seems that in the recent case of *O'Connor* v. *Telephone Co.*, Vol. XIII, No. 10, p. 336 of Canadian Law Times, the appellate Court of Nova Scotia has held that the rights of the abutting owners of the fee on a street extended to the middle of the highway in his front, and that he had a property in ornamental shade trees in the street in his front and could maintain an action against a telephone company for damages (to be assessed, of course, by a jury) for mutilating such trees.

Says Lawson (Vol. III, Rights and Rem., p. 1758): "Adjacent land owners may lawfully use the space between the carriage path and sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property." But the right of property stands upon the more substantial ground of inexorable reason since the city does not appropriate the space between the sidewalk and the street for corporate purposes, and the residuary right of the owner of the fee empowers him to use it.

Even where the right is in the dominant owner to extend its actual dominion if it become necessary no such summary destruction without reason is permitted. Where the fee is condemned for a railway for a distance of one hundred feet on either side of the track, while the corporation may build an additional track if requisite for the transaction of its business at any time during the period of its corporate existence, or may erect structures for corporate purposes upon the land appropriated, yet if the adjacent owner plant and raise corn within the limit of one hundred feet, but not upon the portion of the way actually occupied by the company, the law neither imposes the duty nor confers the power on the latter to cut down such corn as a nuisance because it may obstruct the view of an engineer and prevent him from seeing cattle approaching the line of railway. *Ward* v. *Railroad*, 109 N. C., 358; *Ward* v. *Railroad*, 113 N. C., 566. On the other hand, the corporation may in that case remove trees, because that is authorized by statute, lest they become a nuisance by falling upon the track. But the facts are found and in our opinion the tree was not shown to be a public nuisance subject to summary removal by the city, but was the property of the plaintiff, for the willful destruction of which an action for damage lies against the trespassers and those under whose authority they may have acted. There was no pretense of a condemnation for a public purpose or of authority to take, if it was private property, other than in the mode pointed out in section 60 of the charter, upon a valuation by three freeholders. There was no evidence that the tree was unsound so as to endanger the safety of travelers on the highway, and there was provision of law in or out of the charter authorizing the cutting down of trees located on the margin of the sidewalks or at any point on the streets to avert danger to the public. The authority to make improvements given in a charter, like that to widen the streets, was coupled with the condition that commissioners should be appointed to assess any damage that might be caused by the changes made.

In the case at bar the Court found as a fact that the trees did not obstruct the sidewalk, and in effect that they were not nuisances, and therefore that there was no authority for destroying them.

When such shade treees neither impede the passage of vehicles nor unreasonably obstruct the sidewalks the municipal authorities may enact general ordinances to protect them even against wanton injury or destruction by the owner, but are not empowered by orders or by-laws to cause them to be removed as nuisances, when in law and in fact they are not nuisances. Horr & Bemiss, sec. 252, 229; *McCarthy* v. *Boston*, 135 Mass., 197; Wood on Nuisances, sec. 294. An adjacent owner, notwithstanding an order or ordinance of municipal authorities authorizing it, is entitled to recover damages for any invasion of his individual rights, such as the destruction of shade trees in his front, when they do not interfere with the use of the highway for any public purpose whatever. Horr & Bemis, sec. 7; *Bliss* v. *Ball*, *supra;* Wood, *supra*, sec. 294; Elliott on R. and S., p. 536. And the destruction of shade and ornamental trees, located in a public highway in front of the premises of the abutting owner, has been held to be an irreparable injury to him, and for that reason has been enjoined where their removal was not necessary to the enjoyment of the easement by the public. *Tainter* v. *Morristown*, 19 N. J. Eq., 46; *Cross* v. *Morristown*, 18 N. J. Eq., 305; *Bills* v. *Belknap*, 36 Iowa, 583. "As owner of the fee" (says Elliott, *supra*, 536), "subject only to the public easement, the abutter (who owns the fee) has all the ordinary remedies of the owner of a freehold. He may maintain trespass against one who unlawfully cuts and carries away the grass, trees or herbage, and even against one who stands upon the sidewalk in front of his premises and uses abusive language towards him, refusing to depart." *State* v. *Davis*, 80 N. C., 351.

If the shade trees in front of the plaintiff's house were not a nuisance at common law, nor so declared by statute, no ordinance or proceeding of the municipal authorities or their agents could justify their destruction in the face of the objection of the plaintiff's husband. *Miller* v. *Birch*, 5 Am. Rep., 242; *Yates* v. *Milwaukee, supra;* 1 Dillon, secs. 374 to 379; *Everitt* v. *City of Council Bluffs*, 46 Iowa, 66; *Cooley* and *Fertilizer Co.* v. *Hyde Park, supra.* The three oak trees cut down by the street force, in obedience to the command of the defendant's street committee, King and Scott, after securing the approval of Mendenhall of the same committee, stood at the outer edge of a sidewalk eight feet wide, and within the line of the curbing, and, being directly in front of the plaintiff's dwelling-house, contributed to the comfort of its inmates. The space between the trees and the inner line of the sidewalk was not uniform in width. It averaged eight, but was at no point less than seven feet in width, and was found by the Court to be sufficiently wide to afford "room for persons to pass in the usual manner without inconvenience."

The Judge below found also that "the leaves on said trees obstructed the rays of the sun and so shaded the street as to cause it to be and continue damp for a portion of the time." The finding excludes the idea that the trees were a nuisance in obstructing the sidewalk, and the mere fact that the shade was so dense as to cause occasional dampness under it is not satisfactory evidence that they so interferred with the use of the street as to constitute them a nuisance. *Bliss* v. *Ball*, *supra*. It is a matter of common observation that all trees which subserve the purpose of shading the ground prevent the earth, within the line of their shadows, from becoming dry so soon as the surrounding space. And the commissioners were not authorized, because they had created a stench by filling a hole near the trees with green limbs, to declare them a nuisance as the cause of the offensive odor, since the Court finds that, after removing them, the municipal authorities, by filling the hole with stone, put the street in good condition, and that this remedy could have been effectually used without molesting the trees at all. So far from showing that the removal was demanded for the benefit or convenience of the public, the conclusion of fact submitted by the Court sustains the contention of the plaintiff that being within the curbing (but seven feet or more from the fence) the trees neither obstructed the sidewalk nor the twenty-three feet of carriage way; that the hole could and would have been filled with stone or earth, and that if the dampness under the dense foliage of the trees made them a nuisance every shade tree that subserves the purpose of planting it, if it casts a shadow upon a highway, would be liable to destruction at the arbitrary bidding of any agent of a town who might be entrusted with the duty of repairing its streets. Lawson R. and Rem., sec. 1033, p. 1758. The statutes, which in some States protect such trees, are in affirmance of the principle that the owner surrenders to the public only such dominion over the land as he could not exercise without interfering with the easement of the public for use as a highway. The admitted right of the abutting owner under the common law to the herbage, and to sue or sometimes cause to be indicted and punished criminally a forcible trespass committed on the highway in his front, is an illustration of this well-established principle.

It is urged, however, on behalf of the city of Greensboro that it cannot be held answerable for the trespass committed under the direction of the defendants King and Scott, because it appears that "no action was taken or order made by the Board of Aldermen in respect to the removal of the trees, nor was any report made by the street committee to the said Board with regard to their action in the premises."

It was provided in section 12, ch. 1 of the city ordinances that a number of committees, composed of four aldermen each, should be appointed from the members of the Board to take charge of certain departments of the municipal government, and among them was that composed of defendants King and Scott and Aldermen Glenn and Mendenhall, who by the terms of the next section were entrusted with the "control and supervision of all matters relating to the streets, sidewalks and pumps of the city," etc. This appointment, without any further recognition of their acts, constituted King and Scott the agents of the city for the supervision of the streets and all that could be done for the improvement and reparation of them. 2 Dillon, 979 (777). "Towns, counties, villages and cities must respond for such torts of their officers, agents and servants as have been suffered or committed by corporate authority." Cooley on Torts, p. 122. As agents the relation of the members of the committee to the town was legally the same as that of any servant to his master, and the responsibility of the municipality as superior is likewise governed by the rules applicable to such relation.

Where a trespass is committed in the course of the employment of an agent or a servant and is intended and believed by the trespasser to operate for the benefit of his superior, though it may be willful such superior is none the less answerable for damages. 1 Shearman & Redfield on Neg., sec. 151; Cooley on Torts, p. 536; 4 Am. & Eng. Enc., pp. 252, 253, note 1; *Johnston* v. *Barber*, 5 Gilman (Ill.), 425; *Limpas* v. *Omnibus Co.*, 5 H. & C. Rep. (Exc.), 526. "If in exercising its power to open or improve streets or to make drains or sewers the agents or officers of a municipal corporation, under its authority or direction, commit a trespass or take possession of private property without complying with the charter or statute, the corporation is liable in damages therefor. In such cases also an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injuries done by them." 2 Dillon, sec. 974 (772). "Where the working and repair of streets is treated (as in North Carolina) as a municipal duty, and the officer in charge as a corporate in distinction from an independent public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized corporate improvement or work for them, the doctrine of *respondeat superior* would apply." 2 Dillon, secs. 979 (777), 980 (778) and 983 (4th Ed.). If, then, the city was acting through the members of the committee as its agents, it was in the exercise of its ministerial or corporate as distinguished from its judicial, legislative or discretionary duties, and was therefore answerable as superior for such acts done in the course of their employment as were manifestly intended to enure to the benefit of the corporation. *Moffitt* v. *Asheville*, 103 N. C., 237; Cooley on Torts, p. 619; *Ibid.*, 122. The implication from the finding of the Court (if that was necessary) is that the committee "concurred in the conclusion that the trees should be removed" in order to improve the street, and that King and Scott, as aldermen, intended to benefit the corporation when they directed the street force to do the work. They then sustained the same relation to the municipality, that a conductor or other agent bears to a quasi-public corporation, such as a railroad or street-car company, and it is well settled by numberless cases that, though the agent or servant of such corporations may willfully commit a trespass in the course of his employment, yet if the act is done with the belief that it will benefit the principal or master and the intention to advance its interest, the principle of *respondeat superior* applies. *Moore* v. *Railroad*, 4 Gray (Mass.), 465; *Shea* v. *Sixth Avenue Co.*, 62 N. Y., 180; *Seymour* v. *Greenwood*, 6 H. & N. (Ex.), 359; 1 Shear & Red., sec. 150; Cooley on Torts, pp. 533 to 537; *Simpson* v. *Omnibus Co.*, *supra*; Pollok on Torts, p. 15.

But not only is the corporation responsible for acts done by its agents in the execution of the duties assigned to them, but a joint action for the tort will lie against the company and the servant. *Hewett* v. *Swift*, 3 Allen, 420; *Johnston* v. *Barber*, *supra*; *Wright* v. *Wilcox*, 19 Wendell, 343.

The law is founded upon the highest conceptions of natural justice. It is impracticable for a Mayor and Board of Commissioners to move in a body along every street of a city and sit in judgment upon the proposed removal of a tree. A city must work through agents constituted by its governing authorities, and when an agency is entrusted to a street committee there is no principle of law, reason or justice that will relieve the municipality of liability for their torts when engaged in the business entrusted to it, because the committee did not desist on an objection to the removal of the tree, stop the street force from work and call a meeting of the council to authorize or ratify the act. The town when engaged in the improvement of its streets or in the performance of any act intended for the benefit of the municipality is liable both for the negligence and willful torts of its agents, just as when an officer or servant of a quasi-public corporation commits little overt acts or negligently omits to discharge his duty he subjects the company that he represents to liability for consequent injury. *Moffitt* v. *Asheville*, *supra*; Cooley on Torts, p. 619. If a director of a railroad company were appointed to act as conductor the company could not escape liability for removing a passenger on the ground that by disorderly conduct he had been guilty of nuisance when, in fact, his acts did not justify the conductor in ejecting him. The committee were not the less agents of the town council because they were selected from the body itself. It is a well-known fact that the governing authorities of our towns usually, if not universally, entrust the management of improvements, not involving the condemnation of private property, to committees selected from their own bodies. To absolve the towns from liability for a trespass committed by such agents or under their direction for the benefit of the corporation, when in many cases such committeemen are irresponsible primarily, would be to countenance oppression and in some instances what would be equivalent to confiscation.

An ordinance provided that the street committee "shall have control and supervision of all matters relating to streets, sidewalks and pumps, and shall determine the amount of labor and material to be used * * * and shall report to the board from time to time and perform the duties imposed upon them by the Board of Aldermen." Would the ordinary regulation that conductors should report to the president of the company or superintendent the fact that he had ejected a passenger excuse the company from responsibility for injury caused by a wrongful expulsion? When acting for its own benefit a municipality stands upon precisely the same footing as to liability for the acts of its agents as does a quasi-public corporation. See *Moffitt* v. *Asheville, supra,* and authorities cited. Suppose such a corporation should by means of a by-law declare the conductor, engineer, baggage-master and flagman a committee to have control of the question of ejecting drunken or disorderly passengers or such as failed to secure tickets or pay fare, would the corporation be allowed to evade liability for the wrongful, willful and violent expulsion of a passenger by the conductor and baggageman after consulting the flagman, because the engineer did not approve the act till it was communicated? Cooley on Torts, p. 539. To apply the same principle to such agencies as govern in questions of the right of the directors of private corporations to bind their companies would be the entering wedge to the destruction of all corporate liability for the torts of agents and servants. Means would be found by ingenious regulations to leave the public at the mercy or caprice of irresponsible and reckless agents and servants were the possibility of putting the corporation behind such bulwarks once suggested. The right to trial by jury is none the less a constitutional right because juries are sometimes misled by prejudice. The corrective for such an evil, if it exists, is the enactment of statutes requiring greater care in their selection, not judicial legislation restricting the operation of the original law. Says Judge COOLEY, in his work on Torts, p. 122: "Towns, counties, villages and cities must respond for such torts of their officers, agents and servants as have been committed or suffered by corporate authorities." "It is not merely for the wrongful act that the agent or servant is directed to do, but the wrongful act he is suffered to do, that the city is responsible."

Ibid., p. 534. It was the duty of the city to see that its agents were attentive and prudent, and so conducted its business as not needlessly to injure others. *Commissioners* v. *Nicholas*, 10 Met., 259. The law presumes that the city looks after its street force, and the fact that it was engaged two or three days after the order was given by Scott and King in removing the trees is evidence that the Mayor and commissioners knowingly suffered the removal to be made. They knew or ought to have known what these paid laborers were doing.

I think, therefore, that there was error in the ruling of the Court below that the action could not be maintained either against the city or the two aldermen in their individual capacity. The two aldermen were guilty of a willful trespass, for which the corporation became liable, because it was committed in the attempt to discharge their duty to the corporation as agents named in the ordinance and with the intent to improve its streets. The act being willful, the agents were not relieved of responsibility because the principals were made answerable. The committee were not a corporation, but were the authorized agents of the town, and it was not essential that they should meet like stockholders at an appointed time or place. The question is not whether they could bind a municipality by a contract, but whether, as its servants acting within the line of duty prescribed for them, they could make the city a joint tort feasor with them. It was sufficient, I think, that a majority agreed upon a certain course of conduct and their purpose was carried out by the laborers at the bidding of two of the number, and they were not acting in strict conformity (as stockholders) to the terms of a charter, but were agents carrying out a common purpose to cause a trespass to be committed.

MACRAE, J.: I concur in the above dissenting opinion.

ALLISON & ADDISON v. W. J. MADDREY et al.

WALTON & WHANN v. W. J. MADDREY et al.

Trial—Practice—Judgment—Order of Arrest—Stay of Execution.

Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto.

CIVIL ACTION, heard at December, 1893, Special Term of NORTHAMPTON Superior Court, before *Whitaker, J.*, upon exceptions to a referee's report. There had been an order of arrest issued and served in proceedings ancillary to the main action, and at said term the defendants asked to have their motion to vacate the order of arrest continued, which was allowed, though judgment on the money demand was rendered for the plaintiffs. From so much of the judgment as directed a stay of execution against the persons of the defendants the plaintiffs appealed.

Mr. R. B. Peebles, for plaintiffs (appellants).
Messrs. W. H. Day and *R. O. Burton,* for defendants.

PER CURIAM: While it would, perhaps, have been more orderly to have postponed the entry of judgment for the debt until after the trial of the issues raised in the ancillary proceedings, we perceive that his Honor was so happy in his ruling as to do what the plaintiffs asked and at the same time fully protect the rights of the defendants.

No Error.

J. S. COX, Administrator, v. R. A. BROWER et al., Executors of Susannah Carr.

Presumption of Payment of Legacies—Non-residents.

1. Where twenty years have elapsed between the time when suit might have been instituted for the recovery of legacies and the actual date of suit the law will, for the sake of repose and to discourage stale claims, raise a presumption that the legacies have been paid or satisfied, or that the claim therefor has been abandoned.
2. Such presumption would not be rebutted although it should be shown that the interval between the death of the legatee and the appointment of an administrator had been sufficient to reduce the period during which there was a person to bring action to less than twenty years.
3. The fact that a legatee was at the time of the death of the testator a non-resident of the State will not excuse his laches and delay in bringing suit, since he had the right to sue and the Courts were at all times open to non-residents as well as residents of the State.

This action was begun 30th January, 1892, by the plaintiff as administrator of four deceased legatees under the will of Susannah Carr, deceased, against the executors of the deceased executor of said will for an account, and to recover the legacies, and tried at the Special Term, 1893, of the Superior Court of Randolph, before *Boykin, J.*

The evidence was that the will of Susannah Carr was proven at the August Term, 1859, of Randolph County Court, and that Alfred Brower, the executor named therein, filed inventory of the estate at the November Term of said Court following, as was also report of sale made 30th August, 1859; that the legatees were non-residents of this State before and at the date of the death of Susannah Carr.

Alfred Brower, executor of Susannah Carr, died in 1887.

The plaintiff brought a special proceeding before the Clerk against the defendants for the same cause of action and for same relief on April 13, 1891, which was dismissed sometime between Fall Term, 1891, and Spring Term, 1892, for want of prosecution bond.

The plaintiff qualified as administrator of deceased legatees September 2, 1889.

His Honor held that the action was barred by lapse of time, and instructed the jury so to answer the issue submitted. The plaintiff excepted. The jury answered as instructed, and there was judgment for defendants, from which plaintiff appealed.

Mr. J. T. Morehead, for plaintiff (appellant).

Messrs Shaw & Scales and *Robbins & Long*, for defendants.

Burwell, J.: It seems to have been conceded that more than twenty years elapsed between the date when the intestates of plaintiff, legatees under the will of Susannah Carr, might have maintained suits to recover their legacies and the date when suit was brought by the plaintiff for that purpose. This being true, the law, for the sake of repose and to discourage "stale claims," raises a presumption that these legacies have been paid, or the claim therefor satisfied in some way, or that it was abandoned. *Wilkerson* v *Dunn*, 7 Jones, 125. Mr. Lawson, in his work on Presumptive Evidence, lays down the following rule: "No. 71. Independently of a statute of limitation, or in the absence of one, after a lapse of twenty years, the law raises a presumption of the payment of bonds, mortgages, *legacies*, taxes, judgments, the due execution of a trust and the performance of a covenant"; and he quotes from *Foulk* v. *Brown*, 2 Watts, 216, this approval of it: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome extent. Hence statutes of limitation have been enacted in all civilized communities, and in cases not within them prescription or presumption is called in as an indispensable auxiliary to the administration of justice." This presumption, standing alone, is conclusive in the law, and is so to be declared by the Court, and not to be left to the jury to determine its effect. *Grant* v. *Burgwyn*, 84 N. C., 560; *Alston* v. *Hawkins*, 105 N. C., 3; *Buchanan* v. *Rowland*, 5 N. J. Law, 721; *Rowland* v. *Windley*, 86 N. C., 36. But the plaintiff had the right to rebut this presumption if he could "by showing (at any time during the period which creates the presumption) an acknowledgment of the debt by the debtor, or a payment of part of it, or a known or notorious insolvency or incapacity of the debtor, or by evidence of the relation, situation or intention of the parties, or by other circumstances explanatory of the delay." Lawson, *supra*, rule 74. Whether the presumption has been rebutted is a question of law, the facts being ascertained, and the Court must determine that question and not leave it to the discretion of the jury. *Grant* v. *Burgwyn* and *Rowland* v. *Windley*, *supra*. His Honor properly held that the facts upon which the plaintiff relied to establish his rebuttal were not sufficient in law.

No importance whatever is to be attached to the fact that the legatees were non-residents of this State at the date of the death of the testatrix. The Courts here were open to them as to residents. They had the right to sue if what was due to them was not paid. Having the opportunity and the capacity so to do, it is presumed that they would have exercised that right if their claims had not been satisfied. The same reasons that make it expedient to enforce this presumption against residents of the State prove that it would be inexpedient to make an exception in favor of non-residents.

The record does not show when the legatees, the plaintiff's intestates, died. Assuming that they were alive when the legacies became due, the plaintiff having introduced no evidence to show that they were not, we must hold that the presumption would not be rebutted, though it had been shown that the interval between the death and the appointment of an administrator had been sufficient to reduce the period during which there was a person to bring an action to less than twenty years. *Hall* v. *Gibbs*, 87 N. C., 4.

No Error.

C. H. McKENZIE AND WIFE v. JULIAN E. SUMNER.

Will—Devise—Trust—Trustee—Dry or Naked Trust.

1. A devise of real and personal estate to J. in trust for E. (a married woman), with no limitations over and no duties to be performed by the trustee, is a dry, naked or passive trust and vests the legal title in the property to E. under the statute of uses.
2. In such case E. is entitled to have the personal property conveyed and delivered to her and the trust therein terminated.

Civil action, tried before *Battle, J.*, at February Term, 1894, of Rowan Superior Court.

Thomas J. Sumner devised to the defendant, Julian E. Sumner, in trust for plaintiff one undivided third part of the land upon which he resided in Rowan county, to have and to hold to her and her heirs forever; and also bequeathed stock in the Charleston (S. C.) Mining and Manufacturing Company of the value of $7,500 to said defendant "in trust for my sister, Ellen S. McKenzie." The *feme* plaintiff in her complaint alleged that the trust so created was a naked, dry or passive trust and insisted that she was entitled to a transfer of the property to her.

The defendant denied the conclusions of law as to such trust.

His Honor, upon agreement of the parties, found the facts as follows:

"1. That plaintiff Ellen S. McKenzie is the wife of C. H. McKenzie, who was insolvent at the date of the will, and has been ever since; that the said plaintiff Ellen S. McKenzie, at the time of the making of the will of Thomas J. Sumner, deceased, was and now is possessed of a large and valuable separate estate.

"2. That there was no agreement between plaintiff and the defendant that he should retain five per cent. commissions upon the dividends he collected upon the stock which he held as trustee for the said Ellen S. McKenzie under the said will.

"3. That the executors of Thomas J. Sumner filed a final settlement of his estate on the 31st day of March, 1893, showing a balance in their hands of $9,574.63, and in said settlement they were allowed full commissions, amounting to some $1,100, and that on the 18th day of July, 1893, they filed what is called a supplemental final settlement, in which said executors charged two and one-half per cent.

commissions on ninety (90) shares of the stock which was bequeathed in the will of their said testator to the defendant in trust for the different persons named therein, which was not audited and approved by the Clerk."

Upon these facts, and the facts not denied in the pleadings, his Honor held, as the right of the *feme* plaintiff to the property bequeathed in said will to the defendant in trust for her is absolute, there being no ulterior limitation and no continuing duty to be performed by said trustee, and no provision in the said will for him to exercise acts of government over said property, she having the entire beneficial interest, both in the income of the property and in the property itself, that the property devised and bequeathed to defendant, in trust for her, is but a naked, dry or passive trust; that she is entitled to a decree to have the legal estate in said property conveyed to her and the trust terminated. His Honor refused to allow two and one-half (2½) per cent. commissions claimed by the defendant upon the stock bequeathed to plaintiff, and also refused to sanction the charge of five per cent. commissions for simply collecting and paying over the dividends upon said stock, but did allow two and one-half (2½) per cent. commissions on the said dividends, and gave judgment accordingly, and defendant appealed.

Mr. Lee S. Overman, for plaintiff.

Messrs. T. F. Kluttz and *Craige & Clement*, for defendant (appellant).

Shepherd, C. J.: As to the real estate devised to the defendant for the benefit of the plaintiff, there is no reason why the legal title is not vested in the plaintiff by the statute of uses, as the land is not conveyed to her "sole and separate use" (see authorities collected in Malone on Real

Prop. Trials, 544), nor is the trustee charged in any manner whatever with any special duties in respect to the same. The case does not fall within either of the three well-known exceptions to the operation of the statute, and it would seem clear that the legal estate is executed in the plaintiff. 1 Perry Trusts, 298, and the numerous authorities cited in the note. The statute, however, does not apply to personal property, such as notes and bank stock, and the legal title remains in the trustee until it is in some way transferred to the equitable owner. Is there any reason why the Court, exercising its equitable jurisdiction, should not have directed the assignment of the legal title in this instance? We can see none. The plaintiff being the absolute equitable owner, there are no ulterior limitations to be protected, and under the terms of the will the trustee has nothing but a bare, naked legal estate unaccompanied, as we have remarked, with a single specified duty. As the plaintiff's separate estate is fully protected against the interference of her husband by the provisions of the Constitution, and as the trustee has no power to withhold from her either the property or its income, we are unable to see why the legal title should remain in him, unless it be to enable him to charge the five per cent. commissions which he claims for "simply collecting and paying over the dividends upon the stock."

We do not deem it necessary to enter into an elaborate discussion of the subject, but will simply refer to the following authorities, which, although perhaps not exactly in point, fully sustain, upon principle, the ruling of his Honor: *Turnage* v. *Green*, 2 Jones' Eq., 63; *Battle* v. *Petway*, 5 Ired., 576; *Jasper* v. *Maxwell*, 1 Dev. Eq., 361.

We will add the following extract from Lewin on Trusts, 18: "The simple trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settler (and such is the case here), is left to the construction of law. In this case the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs." This is so clearly a simple trust that under our decisions the property, prior to the present Constitution, would have belonged to the husband. *Ashcraft* v. *Little*, 4 Ired. Eq., 236; *Heartman* v. *Hall*, 3 Ired. Eq., 414.

We have examined the authorities cited by the intelligent counsel for the appellant, but they do not satisfy us that the judgment below was erroneous. The judgment in all respects is Affirmed.

F. S. FAISON v. C. HARDY, Trustee, et al.

Jurisdiction—Removal of Causes—Separable Controversy.

1. Where the object of an action is to set up a parol trust in favor of the plaintiff and to declare him the equitable owner of the interest of the trustors in a deed of trust and to have an account stated of the indebtedness secured by the deed of trust to the end that he may pay the same and obtain a fee-simple title to the property and to enjoin a sale under the deed, the plaintiff and trustors being citizens of North Carolina and the trustee and creditors being citizens of Virginia, the case is one where the matters in controversy are not separable, inasmuch as the issues as to the parol trust must be tried in the Courts of this State and the necessity for an account cannot be determined until the trial of those issues.
2. In such case the fact that the North Carolina defendants have not filed an answer is immaterial.

PETITION of defendants to rehear the case decided at this Term (114 N. C., 58) upon the ground that the Court overlooked the exception to the refusal of the Judge below to remove the cause to the Federal Court upon the motion of the defendants, Hardy, trustee, and Grandy & Sons.

At Chambers in HALIFAX county, May 25, 1893, before *Hoke, J.*, the defendants Grandy & Sons, of Norfolk, Va., the creditors secured by the deed of trust, filed a petition as follows:

"Your petitioners, Caldwell Hardy, trustee, C. W. Grandy and Albert H. Grandy, partners in trade under the name and style of C. W. Grandy & Sons, respectfully show to this honorable Court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum of two thousand dollars, and that they are defendants in said suit.

"That there is a controversy in said suit between citizens of different States, and that your petitioners were at the time of the commencement of this suit and still are citizens of the State of Virginia, and that the plaintiff, F. S. Faison, and the defendants Rosalina Faison, widow, and Rosalina Faison, daughter of J. W. Faison, deceased, Pauline Faison, Mary Faison, Annie Faison and Herod Faison, and John E. Vann, administrator of John W. Faison, were then and are still citizens of the State of North Carolina.

"That there can be a final determination of the controversy in said suit, so far as concerns your petitioners, without the presence of the other defendants as parties in the cause.

"That the substantial controversy in said suit is between the plaintiff and your petitioners.

"That said suit was brought to restrain and enjoin your petitioner, Caldwell Hardy, from making a sale of real estate in Northampton county by virtue of power of sale in a deed of trust executed to him by John W. Faison and wife to secure a note of ten thousand dollars, now held by C. W. Grandy & Sons, all of which is described in the proceedings in said suit.

"Your petitioners further state that in said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to-wit, a controversy between your petitioners and the plaintiff therein, F. S. Faison.

"And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

"And they pray this honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Fourth Circuit and Eastern District of North Carolina."

The motion was denied and defendants excepted.

Messrs. Thomas N. Hill and *W. D. Pruden*, for petitioners.
Messrs. W. H. Day and *R. B. Peebles, contra.*

MACRAE, J.: Neither on the argument nor in the brief of defendants' counsel was there any allusion to the petition for removal to the Federal Court. We were under the impression that the motion had been abandoned and therefore it was not referred to in the opinion filed in this case. Upon the rehearing we have had the benefit of argument upon the point presented.

The opinion of the Court upon the question of continuing the restraining order pending the litigation will be found at page 58 of this volume. It will be remembered that there is but one party plaintiff, F. S. Faison, a citizen of North Carolina, and that the defendants are C. Hardy, the trustee; Grandy & Sons, the secured creditors, citizens of Virginia, and the widow and heirs at law of J. W. Faison, the deceased trustor, citizens of North Carolina.

The object of the action is to set up an alleged parol trust in favor of plaintiff and to declare him the equitable owner of the interest now held by the widow and heirs of J. W. Faison in the lands described in the deed of trust; to have an account taken of the indebtedness secured by said deed to the end that he may pay the same, and have a conveyance of the land by the defendant trustee and said widow and heirs to himself in fee-simple, and to enjoin the sale until the hearing. If the plaintiff shall succeed in this action the widow and heirs of the deceased trustor will be deprived of all interest or property in the lands and in the equity of redemption therein; and if, after the amount due is ascertained, the plaintiff shall fail to pay the same and the sale shall proceed and there shall be a surplus after satisfaction of the debt it will be the duty of the trustee to pay over the same to the plaintiff and not to the heirs or representatives of J. W. Faison, deceased.

The petition for removal is based upon the second section of the Act of March 3, 1887, U. S. Rev. Statutes, and the third clause thereof, which is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

In *Tate* v. *Douglas*, 113 N. C., 190, we noted that under the first clause of said section (that which had reference to a Federal question) all the defendants or all the plaintiffs must unite to accomplish a removal. The third clause, however, permits a removal in case of a separable controversy where the application is made by one or more of the *defendants.* The question, therefore, is whether there is more than a single controversy involved in the action, and if there is whether they can be separated and a single controversy can be eliminated which is wholly between citizens of different States and be fully determined as between the plaintiff and those defendants who are citizens of Virginia, without regard to the defendants who are citizens of North Carolina. The principal controversy in this case is as to the right of the plaintiff to have the equity of redemption,—was there a parol trust between J. W. Faison and the plaintiff which entitled the plaintiff to a conveyance to him of the land in question upon the discharge by him of the debts secured in the deed of trust? This controversy is between the plaintiff and the defendants, the widow and heirs of J. W. Faison, all citizens of North Carolina, and of course is not removable under the Act of Congress. Dependent upon it is the right of the plaintiff to take the place of these defendants, as he seeks to do, and to have an account stated of the amount due the defendants Grandy & Sons, the secured creditors, for it is alleged in the complaint that Grandy & Sons had notice of plaintiff's claim and right. The defendants, citizens of North Carolina, are interested in this second controversy, for if plaintiff fails to establish the parol trust in his favor he will not be entitled to the account demanded. It is manifest that the issues arising upon plaintiff's claim of the parol trust must be tried in the Courts of this State, and the necessity for the account demanded by the plaintiff cannot be determined until the trial of these issues. It is therefore one of those cases wherein the matters in controversy are not separable.

The fact that the North Carolina defendants have not yet filed an answer would not help the petitioners, for we showed in *Tate* v. *Douglas, supra,* that the failure of one of the defendants to answer was immaterial, and the default placed the parties in no different position with reference to a removal than they would have occupied if that one had answered and set up an entirely different defence from that of the other defendants. *Telegraph Co.* v. *Brown*, 32 Fed. Rep., 337; *Douglas* v. *Railroad*, 106 N. C., 65.

This case differs from *Boyd* v. *Gill*, 21 Blacksford, 543, relied upon by petitioners' counsel. There an action was brought by stockholders against directors in a corporation, alleging a fraudulent appropriation of its assets. The right of action arose *ex delicto*, and the tort might be treated as several as well as joint. Therefore the liability of each defendant being several, the controversy was separable. Nor is this such a case as *Texas* v. *Lewis*, 12 Fed. Rep., 1, where, in an action of ejectment, a tenant in possession disclaimed title, the landlord was permitted to come in and defend; and it was held that the tenant in possession was but a nominal party and had no right to prevent a removal sought by the non-resident landlord, the true defendant. In *Racklan* v. *Racklan*, 1 Fed. Rep., —, the controversy was between citizens of different States who claimed the ownership of a bond and mortgage; the mortgagor was also a party defendant; and it was held that he was not necessarily a party, and that the case should be removed where all the other defendants joined in the petition.

We concur with his Honor in the view that the controversy was not a separable one and that the defendants were not entitled to remove the same to the Federal Court.

Former Ruling Affirmed.

POLLY BIRD v. A. M. CRUSE.

Deed—Construction of Reservation in Deed.

A widow conveyed the portion of a tract of land allotted to her as dower by a deed purporting to be in fee-simple; the guardian of the heir, having procured an order of Court for the purpose, sold and executed a deed to the purchaser for the entire tract, embracing the dower portion, but with a reservation as follows: "Reserving the right of dower of the widow, etc., which has heretofore been sold and conveyed": *Held*, that the reservation in the deed by the guardian of the dower right "already conveyed" was a reservation only of what interest the widow had legally conveyed and was not a reservation of the fee-simple in the dower portion.

CIVIL ACTION for the recovery of land, tried before *Whitaker J.*, at November Term, 1893, of ROWAN Superior Court, on a case agreed, the material facts of which appear in the opinion of Associate Justice CLARK. There was judgment for the defendant, and the plaintiff appealed.

Messrs. Lee S. Overman and *T. F. Kluttz*, for plaintiff (appellant).

No counsel *contra*.

CLARK, J.: In 1829 John Bird died seized and possessed of a 200-acre tract of land. Dower therein, consisting of 66½ acres, was allotted to his widow. On October 8, 1831, she conveyed the 66½ acres to Michael Corl in fee. The guardian of Polly Bird, the only child and heir at law of John Bird, having procured an order of Court to sell the land descended to his ward, and having sold the same publicly, executed title on August 22, 1832, to said Michael Corl. This deed embraced the whole 200 acres left by John Bird, with a reservation as follows: "Reserving the right of dower of the widow of the late John Bird, which has heretofore been sold and conveyed to said Michael Corl." The plaintiff, Polly Bird, contends that by virtue of this reservation the reversion in the 66½ acres of dower was not conveyed, and she now sues for the same, the widow having died in 1889. Unfortunately for the plaintiff the deed executed by her guardian, by order of the Court upon a sale of the land descended to her, embraced in its boundaries the whole 200 acres, including the dower. Michael Corl had bought of the widow her dower right, and he bought of the guardian under sale by order of Court the infant's interest in the whole tract subject to the dower. It is true the widow's deed for the 66½ acres purported to convey a fee-simple therein, but she could legally convey only her life estate. The reservation in the deed by the guardian of the dower right "already conveyed" was a reservation only of what interest the widow had legally conveyed, and was not a reservation from the guardian's conveyance of the fee-simple in the 66½ acres. Affirmed.

F. A. SHERRILL & CO. v. THE WEISIGER CLOTHING COMPANY.

Attorney—Extent of Power—Not Authorized to Indorse Notes Held for Collection—Acquiesence in Indorsement by Principal.

1. An attorney to whom a note is sent for collection has, *prima facie*, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority.
2. In such case the acquiescence by the client in such indorsement, supposing it to have been a mere sale of the note, does not constitute a ratification of the unauthorized indorsement.

CIVIL ACTION, tried before *Whitaker, J.*, and a jury, at November Term, 1893, of IREDELL Superior Court.

The issue submitted, without objection, was:

"Are the defendants indebted to the plaintiffs, and if so, in what amount?"

Plaintiffs introduced in evidence note 6th March, 1890, to order of Weisiger Clothing Co., for $108, payable thirty days after date, interest from February 1, 1890, at eight per cent. by J. M. Howard, indorsed to plaintiffs by defendants through A. Wallace; credit, $70 April 16, 1890.

Note 6th March, 1890, for $108 to defendants, sixty days after date, interest eight per cent. from 1st February, 1890, by J. M. Howard, indorsed as other note.

The notes were indorsed as follows:

"Pay to F. A. Sherrill & Co.
"WEISIGER CLOTHING CO.,
"Per A. WALLACE."

W. H. Weisiger, president of defendant company, testified: "After maturity of notes sent them to A. Wallace for collection; the only authority he had was to collect the notes from the obligor; did not know that these notes had been indorsed until about two years after it had been done, and this knowledge came to me by demand from plaintiffs."

Cross-examined.—"I knew these notes had been sold to plaintiffs, but did not know of indorsements."

The following were introduced in evidence: Letter of 17th April, 1890, to A. Wallace by Weisiger Clothing Co.; letter of 19th May, 1890, to A. Wallace by Weisiger Clothing Co.; letter of 13th May, 1890, to A. Wallace by same; letter by same to same, 12th April, 1890. The letters were as follows:

"APRIL 12, 1890.

"A. WALLACE, ESQ., Statesville, N. C.,

"DEAR SIR:—We have yours of 11th instant, and note contents.

"Inclosed we hand you note J. M. Howard $108, due 8th April, and interest $1.58, as requested.

"Hope you'll collect the money without trouble.

"Yours very truly,
"WEISIGER CLOTHING CO.,
"JONES."

"RICHMOND, VA., April 17, 1890.

"MR. A. WALLACE, Statesville, N. C.,

"DEAR SIR:—We acknowledge receipt of your favor of 16th containing check as stated for one hundred and five dollars, which we place to credit J. M. Howard for note due 8th instant, sold to Sherrill & Co., and delivered.

"Please accept thanks for the same.

"Yours very truly,
"WEISIGER CLOTHING CO.,
"Per E. JONES.

"($105.)

"This is satisfactory."

"RICHMOND, VA., May 13, 1890.

"J. M. Howard's note due 8th May. $110.30.

"A. WALLACE, ESQ., Statesville, N. C.,

"DEAR SIR:—The above note was returned to us unpaid this A. M., and we now inclose same to you for collection.

"We hope you will be able to secure the money without trouble. Do your best for us.

"Yours very truly,
"WEISIGER CLOTHING CO.,
"J."

"RICHMOND, VA., May 19, 1890.

"MR. A. WALLACE, Statesville, N. C.,

"DEAR SIR:—We acknowledge receipt of your favor of 18th, containing check as stated one hundred dollars, which we place to credit of J. M. Howard note due 8th May, sold to Sherrill & Co.

"Please accept thanks for the same. This is satisfactory. Yours very truly,

"WEISIGER CLOTHING CO.,
"Per E. JONES."

A. Wallace testified: "Notes sent to me for collection; sold the notes to plaintiffs; had no authority to indorse them."

Affidavit of plaintiffs showing that J. M. Howard soon after April 16, 1890, became insolvent.

J. M. Howard testified: "Became insolvent about April 16, 1890; was insolvent at execution of notes, and they could not have been collected out of me by process of law nor at any time since then."

The Court instructed the jury that if they believed the evidence they would answer the issue, "Yes, $216, with interest at eight per cent. per annum, subject to a credit 16th April, 1890, of $70."

There was verdict and judgment for the plaintiff, and from the refusal of a motion for new trial on account of error in the Court in instructing jury as above, the defendant appealed.

Messrs. Robbins & Long, for defendant (appellant).

No counsel *contra*.

PER CURIAM: The authority of an agent to collect a note or bill does not authorize him to indorse the note or bill either in the name of his principal or on his own account, and the defendant's acquiescence in and approval of the sale, supposing it to be an out and out sale simply, was not a ratification in fact of the unauthorized indorsement, of which he had no knowledge when he approved the sale. *Hines* v. *Butler*, 3 Ired. Eq., 307. The attorney, *prima facie*, had no authority to sell and indorse and the plaintiff, under the circumstances of this case, should have inquired as to the extent of his authority. *Earp* v. *Richardson*, 81 N. C., 5; *Biggs* v. *Insurance Co.*, 88 N. C., 141; Smith Cont., 311.

There should be a New Trial.

ZEB. V. WALSER v. WESTERN UNION TELEGRAPH COMPANY.

Negligence—Telegraph Company—Failure to Deliver Telegram—Consequential Damages—Nominal Damages.

1. Consequential damages, to be recoverable in an action of tort, must be the proximate consequence of the act complained of; and such damage must be capable of computation with reasonable certainty.
2. Where defendant telegraph company failed to deliver to plaintiff a message sent to the latter by the Comptroller of the Currency as follows: "Would you accept receivership of First National Bank, Wilmington? Bond $35,000; compensation $200 per month, subject to future modification," and the pleadings in an action for damages for such failure to deliver raised no question as to exemplary damages, the plaintiff was entitled to recover only nominal damages, inasmuch as if the message had been received and an affirmative reply sent there would have been no legal obligation upon the Government or its appointing power to confer the office upon the plaintiff.

This was a CIVIL ACTION, tried at Fall Term, 1893, of the Superior Court of DAVIDSON County, before *Whitaker, J.*, and a jury.

The complaint was as follows:

The plaintiff complains and alleges:

"1. That the defendant is a corporation duly organized, and is and was in the month of December, 1891, engaged in receiving and transmitting by means of electrical wires messages between the city of Washington, District of Columbia, and the town of Lexington, State of North Carolina, for the public and receiving compensation therefor.

"2. That on the 17th day of December, 1891, the said company received from the Honorable E. S. Lacey, Comptroller of the Currency, and for valuable compensation undertook to transmit and deliver to the plaintiff at Lexington, N. C., a telegram in words and figures substantially as follows, to-wit:

"WASHINGTON, D. C., December 17, 1891.

"Z. V. WALSER, Lexington, N. C.:

"Would you accept receivership First National Bank, Wilmington. Bond thirty-five thousand. Compensation two hundred dollars per month, subject to future modification.

E. S. LACEY,
"*Compt.*"

"3. That said message, as plaintiff is assured and believes, was duly sent from the defendant company's office in Washington, D. C., over defendant's wires to Lexington, N. C., and was duly received by the defendant's agent at Lexington, N. C., but said agent carelessly and negligently kept and retained said message and never delivered the same as it was his duty to have done, in consequence of which the plaintiff never received the same.

"4. That by the failure of plaintiff to receive said message and accept the position tendered him by the said Comptroller of the Currency, which plaintiff would have done, the plaintiff failed to receive the office, or position, which was worth to the plaintiff at least four thousand dollars, as plaintiff believes, to the damages of the plaintiff two thousand dollars.

"Wherefore the plaintiff demands judgment for two thousand dollars and the cost of this action."

The answer was as follows:

The defendant, answering the complaint, said:

"1. That it admits the allegations of the first article thereof.

"2. That it admits the allegations of the second article thereof, except that it avers that it undertook with the said Lacey that it would deliver said message to said plaintiff provided he could, with reasonable diligence, be found in the said town of Lexington, N. C.

"3. That in answer to the allegations of the third article thereof it admits that said message was duly sent and was duly received at Lexington, N. C., as alleged, but it denies the other allegations of the third article.

"4. That it denies the allegations of article four of the complaint.

"Wherefore defendant prays judgment that it go without day," etc.

The following issues were submitted to the jury by consent:

"1. Did the defendant company negligently fail to deliver the message set out in the complaint as alleged therein?

"2. What damages, if any, has the plaintiff sustained?"

"The plaintiff testified in his own behalf: "That on the 17th December, 1891, he lived in Lexington, N. C., and that he did not receive the telegram mentioned in the complaint; that something like a week prior to December 17, 1891, he had been in Washington, D. C., and saw Mr. E. S.

Lacey, Comptroller of Currency; he offered me the receivership of the First National Bank of Wilmington, N. C., but told me the salary would not, in his opinion, be more than the salary formerly paid the cashier of this bank, which, as he thought, was about $1,600 or $1,800; that plaintiff declined to accept the office at that salary; that a day or two later he had another conversation with the Comptroller, in which he, the Comptroller, asked witness if he could take the place at a salary of $2,000 or more, and witness told him he would. Mr. Lacey then said he had unofficial information that the affairs of the bank were in bad condition and asked witness to wait in Washington until he could hear from the bank examiners, then in Wilmington investigating the affairs of the bank; that witness replied that his father was very ill, and in consequence thereof he would have to go home at once; that Mr. Lacey then told witness he would let witness hear from him." (All evidence as to conversation between plaintiff and the Comptroller was admitted after objection by the defendant). "That on the 21st day of December witness received the following telegram from Mr. Lacey:

"'I have to-day appointed W. S. O'B. Robinson receiver of the First National Bank of Wilmington.'

"That this telegram of the 21st December, 1891, was the first communication witness had received from the Comptroller since his return from Washington; that he was in Raleigh on the 17th December, 1891, on business of the public, to-wit, as a member of the legislative committee to examine the books of the State Treasurer; that before witness left for Raleigh, viz., about the 13th or 14th of December, 1891, after he had returned from Washington, he notified T. E. McCrary, then postmaster at Lexington, to wire or repeat to him all messages delivered to him, McCrary, and that he also notified Mr. C. W. Trice, chief telegraph agent of the Western Union Telegraph Company at Lexington, to deliver all messages that should be sent to his office for witness to T. E. McCrary. The telegram dated 22d December, 1891, from Lacey to me was received by me while I was in Raleigh, and is as follows:

"'Telegram received; visit unnecessary; Robinson's commission issued yesterday.'

"This telegram was in reply to one I had sent Lacey from Raleigh on the morning of 22d December.

"On the evening of the 21st December, just before leaving Lexington for Raleigh, on seeing the two telegrams of 17th and 19th December, that I had not received, I sent Lacey the following message:

"'Your message of the 17th just received. Will accept receivership on terms proposed. Wire me at Raleigh, N. C. Am there on committee investigating State Treasurer's books.'

"That witness returned from Raleigh on the night of December 19th, and went back on the night of 21st December to Raleigh. That Mr. Robinson told witness he was still engaged as receiver of the bank; that witness was during this period receiving a salary of $1,400 as Deputy Collector, and continued to receive the same up the 5th of August, 1893.

On cross-examination witness said: "That he was not an applicant for this receivership; that he told the Comptroller when he talked with him that he would like to have it if he could pay $2,000 or more; that he saw Judge D. L. Russell and Mr. Robinson in Washington and had a conversation with them; that he saw the Comptroller last about six P. M. and left Washington at eleven P. M. same day; that witness told Robinson and Russell that he had told the Comptroller he would not take the receivership—that he had declined it; that he did not remember stating to them that he had declined it because of the inadequacy of the salary; that Robinson is a good man—a man of character; that witness has a free pass from the R. & D. R. R. Co. as compensation as local attorney for that company, and that he may have had $5 or $10 from other sources. This receivership is held at the pleasure of Comptroller and liable to reduction of salary. That after interview with Comptroller at six P. M. he had no interview with Robinson or Russell."

It was admitted that the following telegram was sent by the Comptroller of the Currency to the plaintiff at Lexington, on the 19th December, 1891, to-wit: "I may conclude to appoint Robinson," and that the same was received at defendant's office in Lexington and never delivered either to plaintiff or to McCrary, his agent.

T. E. McCrary, for plaintiff, testified that the message mentioned in the complaint was never delivered to him for Walser.

William Swicegood, for defendant, testified: "Plaintiff talked to me about receivership; told me it had been offered to him. I told him I would like for him to remain in the county as Deputy Collector. He said he would not take the receivership; that he could not afford to do it for the difference there was in the salaries of the two places. He said the telegraph company had failed to deliver to him the telegram; that he was glad they had, because he could hold his Deputy Collectorship and sue the telegraph company and get as much out of the company as he might have made as receiver. This was a day or two after he got back from Raleigh."

There was much other evidence offered by both plaintiff and defendant as to the delivery of the message set out in the complaint.

The Judge charged the jury:

"1. That in no aspect of this case can the plaintiff recover more than nominal damages.

"2. That nominal damages meant five cents, twenty-five cents, or fifty cents, or other small amount."

The jury answered the first issue, "Yes," and the second issue, "Seventy-five cents," and there was judgment accordingly; and from the refusal of a motion for a new trial for misdirection in the charge of the Judge, as set out above, plaintiff appealed.

Messrs. George F. Bason and *Watson & Buxton*, for plaintiff (appellant).

Messrs. Jones & Tillett, for defendant.

MACRAE, J.: The telegram set out in the complaint does not constitute an offer or tender of an office by the Comptroller to the plaintiff. It is an inquiry whether the plaintiff would accept a position named at the compensation stated. If it had been promptly delivered, as it should have been, and an affirmative answer had been returned, there would still have been no legal obligation upon the Government or its appointing power to have conferred the office upon the plaintiff.

While for the wrong done him by the negligence of the defendant in its failure to deliver the telegram the plaintiff is entitled to nominal damages at least (as has been so recently held by this Court that it is unnecessary to elaborate the proposition, *Young* v. *Telegraph Co.*, 107 N. C., 370), still there must be some measure by which damages may be computed before their assessment can be submitted to a jury.

What would be the measure of the plaintiff's damage? For the best of reasons, often reiterated in all appellate Courts of common law jurisdiction, juries are not permitted to enter the regions of conjecture or speculation. When it is possible to ascertain a sum certain, of which the plaintiff has been deprived by the action or neglect of defendant, there is no difficulty in making the assessment. If there had been an unconditional offer of employment for a time certain, or, perhaps, if the length of the employment could have been reasonably computed and the compensation had been fixed, or its reasonable value determined, there would have been a fair measure of the plaintiff's injury. Can the damages which would naturally be expected to follow the injury be computed?

There is no reasonable certainty that plaintiff would have been appointed to the office. The result of the failure to deliver the message is simply that plaintiff *may* have lost an office. Consequential damage to be recoverable in an action of tort must be the proximate consequence of the act complained of. *Sledge* v. *Reid*, 73 N. C., 440. And such damage must be capable of computation with reasonable certainty.

The conditions failed in the present case because there was no such offer the neglect to communicate which deprived the plaintiff of the lucrative place named in the message.

While we have found no case directly in point in our own Reports there is no lack of authorities in the Courts of other States. In *Western Union Telegraph Co.* v. *Connelly*, 2 Texas Court of Appeal—civil cases (reported in *Chicago Legal News*, March 29, 1884), a telegram was sent from one Harris to Connelly in these words: "If you want a place, come on first train. Answer." Connelly brought suit alleging that by the failure of the telegraph company to deliver this message he lost the job, and the Court held that he was entitled to nominal damages only, and, in speaking of the telegram, said: "It does not contain any proposition which, if accepted by appellee, would amount to a contract binding upon Harris. If appellee had answered the telegram that he wanted a place and would go to Milano on the first train, and he had gone on the first train, Harris would not have been under any legal obligations to give him a place. Suppose appellee had received the telegram and had gone to Milano on the first train and Harris had declined to give him the place, or had declined to employ him at $75, could appellee have maintained an action against Harris to compel him to enter into such contract, or to recover damages for his refusal to do so? Clearly not. * * * How, then, can it be contended that he is entitled to recover of appellant an alleged loss of gain, which gain might never have been realized, even if the telegram had been properly delivered to him?" A number of authorities are cited to support the ruling.

In *Merrill* v. *Western Union Telegraph Co.*, 78 Me., 97, in which the plaintiff's agent wired him that employment had been secured for him at $2.25 per day, commencing with September 1st, the plaintiff failed to get the message in time to reach the place on September 1st, and he therefore claimed that by the negligent failure of the telegraph company to deliver the message he lost the benefit of this contract, and he sued for damages. The Court denied the right to recover more than nominal damages, and said: "The contract was defeasible at the will of either party. How, then, can any substantial damages be measured? Had the engagement to employ the plaintiff been for any stipulated definite period not over one year the plaintiff would have a right to demand damages that could be definitely measured and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but under the terms of the contract in proof he was liable to be dismissed from his employment as soon as he had entered upon it, and it cannot be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages."

In *Clay* v. *Telegraph Co.*, 81 Ga., 285, a party wired the plaintiff to come to a certain place prepared to do certain work. Plaintiff failed to get the message and sued for damages for loss of the job. The Court held that plaintiff had only lost the *opportunity* of making a contract, and was entitled only to nominal damages. The message in question was merely a request for information upon which to base some contemplated but undisclosed action, and damages arising from a failure to deliver such message are too remote. Thompson on Electricity, sec. 321.

It follows that the plaintiff, having been injured, is entitled to some compensation; but the damages can only be nominal, because there is no measure by which they can be computed, unless, indeed, by reason of willful or reckless disregard of plaintiff's rights, or some aggravation of the injury, the law will authorize the jury to disregard the measure and give exemplary damages, the limits of which are only subject to the restraining power of the Court's discretion; or unless there be such gross negligence charged and shown, coupled with some mental anguish or distress, its consequence, as will warrant the award of compensation for the injured feelings.

The issues submitted by consent point to the simple question whether the defendant negligently failed to deliver the message, and if so, what was the damage to plaintiff?

There were no instructions asked upon the question of exemplary damages, and we are led to the irresistible conclusion that it did not arise upon the pleadings and was not presented upon the issue. In this view we concur with his Honor that in no aspect of the case could the plaintiff recover more than nominal damages. No Error.

WALLACE BROS. v. R. M. DOUGLAS.

Evidence—Transcript of Records.

1. The matters appearing in transcripts of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence before him by virtue of the provisions of chapter 501, Acts of 1891, which was passed pending the suit in which they were offered but before the account was stated.
2. In a suit by the holder of drafts against a United States Marshal who accepted the drafts drawn on him by three Deputy Marshals payable when he, the Marshal, should receive funds to the use of such deputies, transcripts of such part of papers on file and records of the Treasury Department as contained the accounts and vouchers of the Marshal relating to such deputies, are admissible in evidence to show how much was allowed to the defendant for the Deputy Marshals and are not objectionable as being fragmentary.

CIVIL ACTION, heard by *Whitaker, J.*, at November Term, 1893, of IREDELL Superior Court, upon exceptions to the report of a referee.

The plaintiffs appealed from the judgment of the Court sustaining certain exceptions of the defendant to the report. The facts sufficiently appear in the report of the same case in 103 N. C., 19, and in the opinion of Associate Justice BURWELL.

Messrs. Armfield & Turner, for plaintiffs (appellants).
Messrs. Robbins & Long and *Furches & Coble*, for defendant.

BURWELL, J.: This cause was before the Court at February Term, 1889 (103 N. C., 19). In the report of that appeal will be found a full statement of the matters in controversy in the action.

The main question presented now for our consideration is this: Were the transcripts from the Treasury Department of the United States, called in the record Exhibits "A," "B," "C" and "AA," admissible as evidence for the plaintiffs upon the taking of the account before the referee? He admitted them, examined them, and from the statements contained in them found certain facts. His Honor ruled that the referee erred in so doing.

These transcripts are certified to by the Register of the Treasury and his certificate is authenticated by the Secretary of the Treasury under the seal of his department. If the matters contained in these transcripts were relevant to the account which the referee was required to take they were admissible in evidence before him by virtue of the provisions of chapter 501 of the Laws of 1891, if for no other reason. That act was enacted while this suit was pending, but before the taking of the account. It seems to have been framed to obviate any objection to the introduction as evidence in the Courts of this State of transcripts just such as these are.

It is objected to them that they are fragmentary. We do not think they are liable to that objection. The plaintiffs sought to show the referee what sums had been earned by the defendant's deputies, W. J. Patterson, J. T. Patterson, Jr., and S. P. Graham, and what sums the defendant had demanded of the Government on account of their services. The vouchers of each of these deputies, which the defendant himself presented to the proper officer of the Treasury Department, were the very best evidence of the sum which he claimed in his account for them. When filed these vouchers became a part of the record of the department, and duly certified copies thereof became competent evidence under the provisions of the act above mentioned. The transcripts ("A," "B," "C") purport to contain "the vouchers"; that is, all the vouchers of each of these deputies. If they purported to contain only some of them they would yet be admissible. Their effect is a different matter. But these transcripts purport to contain not only copies of each voucher of each of these three deputies, but also extracts from the books of the Treasury showing how much of the sums charged by the defendant on their account had been disallowed, thus, in effect, showing how much of the gross sum so charged was allowed to the defendant in his account with the Treasury Department, that amount being ascertainable by the simple process of subtraction.

The transcript marked Exhibit "AA" was also admissible. It was properly certified and purported to contain copies of certain records and accounts of the Treasury Department showing the amount and date of certain payments made to the defendant as United States Marshal. In his conditional acceptance of the drafts drawn on him by his deputies, as alleged in the complaint, he himself designated the source from which were to come the funds to meet these obligations. The drawers of the drafts were his employees, and his contract with the plaintiffs was in effect that what these deputies earned, to the limit of the drafts accepted, would be paid, when allowed by the Treasury Department and collected by him, not to the several deputies, but to the plaintiffs. It was not necessary that the plaintiffs should produce all the accounts of the defendant as United States Marshal, or certified copies thereof. He was required to put in evidence only so much of his accounts as he was advised was pertinent to the matter in controversy, and, if there were other accounts or vouchers that would throw light on his dealings with the drawers of these drafts, and tend to show that he was not liable on account of his conditional acceptance of them, it was the privilege of the defendant to introduce such records and accounts in evidence, and thus counteract the force of the evidence of the plaintiffs.

What is said above disposes of the second and third exceptions of the defendant to the report of the referee. There was error in sustaining these exceptions, as there was also in sustaining his first exception. It seems sufficient to refer to the statement contained in the report and to the former ruling of this Court in this cause (105 N. C., 42) to show that the inadmissibility of Exhibits "A," "B" and "C" was not finally and conclusively determined by his Honor Judge Connor, as seems to be insisted by the defendant in this exception.

The eleventh exception of defendant seems to us to be of no force, as one-half of what the deputies seem to have earned is more than enough to satisfy the plaintiff's demand.

His Honor should have considered the transcripts "A," "B," "C" and "AA" as evidence in the cause, as the referee did, and with that evidence before him should have passed upon the other exceptions filed by the defendant.

Remanded.

JASPER CLAYBROOK v. COMMISSIONERS OF ROCKINGHAM COUNTY.

Town Subscription to Railroad—Election—Declaring Result—Issue of Bonds, validity of—Purchasers of Bonds, when and when not affected with notice.

1. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds or in the proceedings under which they are issued, a purchaser takes with notice, and there can be no such thing as an innocent holder.
2. The only authority that can fasten upon a municipality an obligation to pay a subscription to a railroad is the duly ascertained vote of a majority of its qualified voters, and bonds issued without such vote being ascertained and declared are invalid even in the hands of an innocent purchaser.

3. Where an act of the Legislature (ch. 87, Acts of 1887) authorizing towns along the line of a proposed railway to purchase its stock and issue bonds in payment thereof, upon the vote of a majority of the qualified voters, required that the County Commissioners should ascertain and declare the result of such election and, upon an affirmative vote to issue the bonds, a statement by the County Commissioners that "after due canvass, the foregoing returns of election are correct and the said Board hereby approve the said returns" is not a declaration that a majority of the qualified voters favored the subscription.

4. A purchaser of municipal bonds which, upon their face, refer to the statute under which they are issued is bound to take notice of the statute and all its requirements; and, therefore, where bonds were issued by the Commissioners of a county on behalf of a town under an act of the Legislature authorizing the issue upon an affirmative vote of a majority of the qualified voters of the town, and neither the declaration of the result of the election by the Commissioners nor the recitals in the bonds show that a majority of the voters of the town voted in favor of the subscription, the purchasers of the bonds, though *bona fide* and for value, will not be protected in a suit by tax-payers to restrain the collection of taxes to pay the same, unless a jury shall find that question in the affirmative.

5. An election held on the day named by the County Commissioners for a vote upon the question of issuing bonds in aid of a railroad, under ch. 87, Acts of 1887, is not vitiated by the fact that, through mistake, another date was copied in their minutes.

6. In voting on the question of subscribing for railway stock and issuing bonds in payment therefor, under Laws 1887, ch. 87, requiring that those in favor thereof should vote "Subscription," and those opposed "No Subscription," it is immaterial that the electors voted "For Subscription" and "Against Subscription."

7. The fact that petitioners for an election to decide whether the town should purchase railway stock and issue bonds therefor, under Laws 1887, ch. 87, styled themselves "voters and tax-payers," while the act required a petition by "resident tax-payers," was immaterial.

8. The fact that the County Commissioners canvassed the returns of such election the second day thereafter, instead of the third, as provided by the statute, is immaterial.

This was an ACTION brought by Jasper Claybrook and others, citizens of the town of Stoneville, to the Fall Term of the Superior Court of ROCKINGHAM County, against the Board of County Commissioners of Rockingham county, to test the validity of an election held in said town under chapter 87 of the Laws of 1887, for a subscription of $5,000 to the capital stock of the Roanoke & Southern Railway Company, and for injunctive relief against the issue or sale of such bonds, and against the further collection of taxes to pay the interest thereon. A temporary injunction was issued returnable during the Fall Term of Rockingham Superior Court, before *Winston, J.*, and upon the filing of the answer of the Commissioners, duly verified, the Virginia and North Carolina Construction Company and J. M. Cummings, the purchasers of said bonds, were by order made parties defendant, and filed their verified answers; and the matter of the injunction was finally heard upon the plaintiffs' verified complaint, replies, affidavits and exhibits, and the defendants' answers, affidavits and exhibits, as set forth in the record, the pleadings being used as affidavits.

His Honor rendered judgment continuing the injunction, and the defendants appealed.

Messrs Reid & Reid, for plaintiffs.
Messrs. Mebane & Scott, for defendants (appellants).

MACRAE, J.: The provisions of the act to incorporate the Roanoke & Southern Railway Company (Laws 1887, ch. 87) which are applicable to our present inquiry are substantially as follows: Any town through or near which the said road may run may subscribe for and hold stock in said company, when authorized so to do by a majority of all the qualified voters of such town, under the provisions of the said act. Upon presentation of a petition, signed by at least twenty resident tax-payers of any town, to the Board of Commissioners of any county in which said town is situated, requesting said Commissioners to submit to the vote of the *qualified voters* of their town a proposition to subscribe a definite sum named in the petition to the capital stock of said company, the Board of Commissioners shall, within sixty days, order an election to be held and submit to the qualified voters thereof the question of subscribing, according to the petition; at which election those in favor of such subscription shall vote "Subscription," and those opposed shall vote "No subscription." The said election is directed to be held, registrar, poll-holders and judges appointed, and the registration of voters taken as provided by law for the election of Commissioners or Aldermen of cities and towns, except that the poll-holders shall make returns within three days after the election of the votes cast to the Board of County Commissioners, who shall, on the third day after the election, canvass the returns, *declare the result* and cause the same to be entered on their minutes. And if a subscription shall be directed by a majority of all the qualified voters of the town the chairman of the Board of Commissioners shall, within sixty days after said vote is ascertained, subscribe the amount so authorized, to be paid for in the bonds of the town at their face value, and the Board of Commissioners shall issue coupon bonds to the amount authorized in the denominations specified in the act, indicating on the face of the bond on account of what town and the conditions upon which they are issued. Said bonds are to run not exceeding forty years, and bear interest not exceeding six per cent. per annum. And the Board of Commissioners are to levy annually a special tax upon all the property and polls of said town to regularly pay the interest as it shall fall due and to provide a sinking fund to pay off the principal at the maturity of the bonds. The tax-collector of the town is to collect the tax and promptly apply it to the payment of the interest and principal as provided for in the act. By chapter 118 of the Acts of 1893 there was an amendment to the foregoing, providing that if any such city or town fail or neglect to appoint a tax-collector on or before the 30th day of May of any year it shall be the duty of the Sheriff of the county to collect all taxes duly levied upon the property and polls of said town.

On the first Monday in October, 1888, a petition was filed before the Board of Commissioners of Rockingham county, purporting to be signed by twenty-three *voters and tax-payers* of the town of Stoneville, asking the Board to order an election in the town of Stoneville, and an election was ordered to be held on the 3d day of November, 1888, at which the legally qualified voters may be entitled to vote for or against a subscription of $5,000, etc. And, as appears from the minutes of the Board, return was made of said election by the judges and registrar to the Board of Commissioners on the 5th of November, 1888, and the following action taken by the Board:

"It appearing to the satisfaction of the Board of County Commissioners, after due canvass, that the foregoing returns of election are correct, and the said Board hereby approve the said returns."

On December 8, 1890, the Board of Commissioners delivered to the Roanoke & Southern Railway Company fifty bonds of $100 each, a copy of one of which bonds (all being alike) is made a part of the statement. On December 19, 1890, the said bonds were transferred and assigned by said railway company to the defendant construction company, in consideration of work and labor done upon said road, and said railroad was built and is now operated through the town of Stoneville.

The plaintiffs allege the following irregularities in the proceedings under which the election was held and the action of the Board of County Commissioners thereafter:

"1. That the petitioners styled themselves voters and tax-payers of the town of Stoneville, and not *resident* tax-payers, as required by section 22 of the Act of 1887.

"2. That the election was ordered to be held on the 30th of November, and was held on the 3d day of said month.

"3. That there was no registration of voters had before the election, as required by law.

"4. That the ballots used in said election were 'For subscription,' instead of simply 'Subscription,' and '*Against* subscription,' instead of 'No subscription,' as the statute required.

"5. That it nowhere appears that a majority of the qualified voters of the town voted in favor of subscription.

"6. That no qualified voter of the town did vote 'Subscription.'

"7. That the Board of Commissioners made no canvass of the returns of said election on the *third* day thereafter, as by law they were required to do.

"8. That the Board of Commissioners failed to ascertain the result of said election, or to declare the same, or to cause the same to be entered on their minutes."

And the plaintiffs further charge that the bonds have never passed into the hands of innocent holders for value without notice of the alleged irregularities. The complaint, answers and replies, together with many affidavits, were offered upon the motion for an injunction, which it will not be necessary to set out here, as we have stated the contentions of the parties.

The holders of the bonds in question have been made parties and have filed their answers. The defendants contend:

"1. That the plaintiffs have failed to bring their action within a reasonable time and until the bonds have passed into the hands of innocent or *bona fide* holders for value and without notice, and therefore that the action should be dismissed.

"2. That the general allegation of the complaint that a majority of the qualified voters did not vote subscription is too vague and not stated with the certainty required; and so with regard to the allegation that the registration books were not kept open for thirty days before the election, it not being alleged that any voter was deprived of the right to register and vote.

"3. That a majority of qualified voters did vote in favor of subscription.

"4. That the bonds in question have passed into the hands of *bona fide* holders for value and without notice, and that the Board of Commissioners and the town of Stoneville are estopped from denying the validity of the bonds by the entries upon the minutes of the Board and the recitals in the bonds."

It will be seen that two issues arise upon the pleadings, involving serious questions in dispute:

1. Did a majority of the qualified voters of the town of Stoneville vote for subscription?

2. Are the defendants the Virginia and North Carolina Construction Company and J. M. Cummings *bona fide* holders of the bonds and without notice of any irregularities in their issue?

It follows that pending the determination of these issues it will be necessary that the injunction should be continued.

In considering the questions presented to us by the contentions of the parties as to the liability of a municipal corporation on bonds issued for its benefit we are traveling upon a beaten track. The law has been well settled by repeated adjudications in the Supreme Court of the United States and in many of the States of the Union, and nowhere better than by our predecessors in this Court.

There is no statute of limitations applicable to this action; therefore it must be brought within a reasonable time and before the rights of innocent holders have intervened. *Jones* v. *Commissioners*, 107 N. C., 248.

It will be understood that where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds or in the proceedings under which they are issued a purchaser of the bonds takes them with notice, and there can be no such thing as an innocent holder; or, where there is a plain violation of the statute conferring the authority to issue bonds, as in *Anthony* v. *Jones*, 101 U. S., 693, where the bonds were required by the statute to be presented to the State Auditor to be registered, certified and indorsed before they were negotiable, and this requirement was disregarded, the notice of the defect was borne upon the bond itself by the lack of indorsement; or, in *McClure* v. *Oxford*, 94 U. S., 429, where the recitals in the bonds showed that they were illegally issued, the same result will follow.

The doctrine now so thoroughly settled is stated in a very able opinion by Mr. Justice BYNUM in *Belo* v. *Commissioners*, 76 N. C., 489: "While the decisions are very uniform that the record of the Justice's Court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive, and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it." Many authorities are cited, and since the decision was made the principle has often been reiterated in this Court, more especially in numerous cases where actions were brought to restrain the collection of special taxes for graded schools and under the fence law, where it was uniformly held that the declaration and finding of the Board of Commissioners that, at an election which was properly held, a majority of the voters favored the provisions of the act was final and conclusive, except when attacked by direct proceedings brought for that purpose before rights of innocent holders had intervened. *Simpson* v. *Commissioners*, 84 N. C., 158; *Cain* v. *Commissioners*, 86 N. C., 8; *Smallwood* v. *Newbern*, 90 N. C., 36; *State* v. *Emry*, 98 N. C., 768.

In the Supreme Court of the United States there is an unbroken current of authorities from *Knox County* v. *Aspinwall*, 21 How., 539, to *Hodges* v. *Dixon*, 150 U. S., 182, where it is said, after citing many authorities, that "recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of a constitutional provision no such estoppel can arise by reason of any recitals contained in the bonds."

The exception as to issue or violation of constitutional provisions is expressly stated in *Duke* v. *Brown*, 96 N. C., 127, and in *Railroad* v. *Commissioners*, 109 N. C., 159. In the former case it was said: "But it may be suggested that the defects not known to the innocent purchasers of these public securities do not enter in to vitiate their obligatory force, when the vote has been officially counted and the result announced. This is true, as held in *Norment* v. *Commissioners*, 85 N. C., 387, and when those charged with the conduct of an election have determined the facts necessary to its efficacy, this being matter *in pais*, it is to be taken as conclusively settled, as in that case, that a majority of all the qualified voters of the city had voted in favor of a graded school. This is not our case. The Commissioners to whom the vote is certified determined the respective votes for and against the issue of the bonds, and a majority thereof in favor of it, as allowed by said act for the purpose therein set out, and that all the requirements of said act and of the law have been duly and regularly complied with. They do not certify, nor could they on the returns made, that the constitutional majority of affirmative votes had been cast, and in this feature the case essentially differs from that of *Norment* v. *Commissioners*."

In *Railroad* v. *Commissioners, supra*, it is said: "The only authority that can fasten upon the township an obligation to pay a subscription is the duly ascertained vote of a majority of its qualified voters. Without it any action of the County Commissioners or township Justices, appointing agents to subscribe for and to represent or vote for said township in the stockholders' meetings of the plaintiff company, was a nullity and *ultra vires*. The life-giving power required by the Constitution, the due expression of the popular will at the ballot-box, being lacking, if the Commissioners had gone still further and actually issued the bonds they would have been invalid even in the hands of innocent purchasers."

By reference to the returns of election it will be seen that it is simply that the votes cast were for subscription 21, against subscription 1. And the declaration of the Board of Commissioners is that it appearing to them, "after due canvass, that the foregoing returns of election are correct, and the said Board hereby approve the said returns," there is no declaration here that a majority of the qualified voters favored the subscription.

We must look, then, to the recitals in the bonds, and there we find it stated that "the Board of Commissioners of the county of Rockingham, legally representing the body of the town aforesaid, having duly ascertained the sense of the qualified voters of the town aforesaid to favor a corporate subscription to the capital stock of the Roanoke & Southern Railway Company, by an election heretofore duly held for that purpose, have caused this bond to be issued to meet the installments upon the town subscription to said company, and the whole is done by virtue of an act of the General Assembly ratified the 23d day of February, 1887, chapter 87, Acts of 1887."

While the recitals in the bond are binding and conclusive in favor of a *bona fide* holder for value, they refer to the act of Assembly under which the election was held, and put the purchaser upon notice of the requirements of the act, the same being a part of the recital by virtue of the reference to it. "To be a *bona fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements." Chief Justice WAITE, in *McClure* v. *Oxford, supra.* Referring to section 22 of said act, it will be seen that the duty of the Board was to submit to the qualified voters of the town the question of subscribing to the capital stock of said company *the amount specified in the petition*, so that the recitals in the bond do not show a full compliance with the requirements of the act.

Treating the other irregularities charged by plaintiffs as only irregularities which would not vitiate the bonds in the hands of an innocent holder for value, the main question alleged and denied is whether a majority of the qualified voters of the town of Stoneville voted in favor of the subscription, and this question must go to a jury. *Railroad* v. *Commissioners, supra,* and cases there cited.

As the recitals, both in the declaration of the result and in the bond, are defective, we are of the opinion that even though the holders of the bonds shall be *bona fide* and for value, they will not be protected unless the jury shall find that a majority of the qualified voters of Stoneville voted in favor of the subscription. We are also of the opinion that the petition styling the petitioners voters and tax-payers instead of *resident* tax-payers, as required by the statute, is an immaterial variance, for to be a voter it is necessary to be a resident.

It appears by the amended minutes of the Board of Commissioners that the order for an election was made for the 3d, the day on which it was held, and that the figure 30 was copied by mistake.

If it shall be made to appear by a verdict that a majority of the qualified voters voted in favor of the subscription we see no requirement that there should have been a new registration for the purposes of this election. The affidavits are conflicting, the registrar himself furnishing to each side an affidavit in support of its contention—the one as strong as the other. Whether the registration books were kept open or not would be controlled by a finding as to whether a majority of the qualified voters voted in favor of subscription, it being borne in mind that a qualified voter is a registered voter. *Southerland* v. *Goldsboro*, 96 N. C., 49, and *Duke* v. *Brown, supra.* It does not appear that the ballots used did not follow the exact requirements of the statute. It was the *return* which stated that the votes were passed for subscription and against it, and this would follow if the ballots had been simply "Subscription" and

"No subscription." Indeed, we should hold that this variance, if it were proved, was immaterial, as it expressed the same meaning. We think and so hold that the examination and approval of the returns of election were a substantial compliance with the requirements of the statute that the Board shall declare the result, etc. The fact that the tax levied made no provision for a sinking fund might be a grievance to the holders of the bonds, but we cannot see that the plaintiffs are prejudiced thereby. And the canvass on the second instead of the third day after the election was an irregularity which would not prejudice a *bona fide* holder.

It will be necessary to submit the second issue which we have suggested, because if the subscription was authorized by a vote of a majority of the qualified voters the alleged irregularities would not prevail against a *bona fide* holder for value and without notice. Affirmed.

S. L. LONG v. HOME INSURANCE COMPANY OF NEW ORLEANS.

Practice—Special Appearance—Service of Summons Outside of State—Jurisdiction—Attachment.

1. The finding of the Court below that an appearance entered by a defendant in an action was a special appearance is not reviewable in this Court.
2. The service of summons and other process which ch. 120, Acts of 1891, authorizes to be made upon a non-resident by an officer of the county and State where he resides, is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to-wit, in actions which are virtually pro-

ceedings *in rem* or *quasi in rem*, and in which the jurisdiction as to non-residents only authorizes a judgment acting upon the property.

3. Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons and, hence, actual service in another State "in lieu of publication" would be invalid.
4. Where the enforcement of a debt or other liability is sought by subjecting property of a non-resident, the jurisdiction is based upon the seizure of the property and only extends to the property attached; and no personal judgment can be rendered against the defendant, not even for the costs, or affecting other property within the State.

The plaintiff caused summons to be issued by the Clerk of FORSYTH Superior Court and to be served on the defendant corporation in New Orleans by an officer of the State of Louisiana, as provided for in ch. 120, Acts of 1891. At August Term, 1893 (the return Term), the plaintiff filed his complaint and an attorney for the defendant entered a special appearance and moved to dismiss the action, for that the defendant was not in court, and that no sufficient affidavit for summons to issue to a foreign State under ch. 120, Acts of 1891, had been made.

Plaintiff's counsel moved for judgment, stating that there was an affidavit filed or he would file a sufficient affidavit. His Honor declined to give judgment, but gave plaintiff time to file affidavits to obtain the jurisdiction of the Court, and gave to defendant time to answer.

On December 4th the plaintiff filed an affidavit, as follows:

"S. L. Long, being duly sworn, says that the defendant company has its general place of business in the city of New Orleans, and therefore prays a summons and asks process issue that the same may be sent to the Sheriff or other proper officer of that city."

At the December Term, 1893, defendant's attorneys stated that they entered a special appearance with Mr. Patterson and moved to dismiss the action, for that no sufficient affidavit had been filed warranting the process of the Court or obtaining the jurisdiction of the Court; that it was admitted that the defendant was a resident of the State of Louisiana, and plaintiff had not alleged it had property within the State of North Carolina, and that the action was simply *in personam.* Plaintiff moved for judgment for want of an answer, and alleged that his affidavit of December 4th was sufficient and that defendant was in court. His Honor *Winston, J.*, held and found as a fact on the affidavit of J. L. Patterson filed and statement of counsel that a special appearance only had been entered, and asked plaintiff if he wished to file an additional affidavit or wished an *alias* summons. Plaintiff stated that he did not, and moved for judgment on his complaint. This his Honor declined.

The defendant moved to dismiss the action, which motion his Honor granted and plaintiff appealed.

Mr. J. S. Grogan, for plaintiff (appellant).
Messrs. Glenn & Manly, for defendant.

CLARK, J.: The finding of the Court below that the appearance of the defendant at August Term was a special appearance is not reviewable.

The Act of 1891, ch. 120, authorizing service of summons and other process upon a non-resident by an officer of the county and State where he resides, is, as the act expresses it, only "in lieu of publication in a newspaper." It can only be done in those cases in which publication could be made and has only the effect publication would have, except it may be that when the actual notice is brought home by such service to a non-resident he has not the right allowed the defendant when publication is made by *The Code*, §220, to defend after judgment. But as to this we need not decide now.

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the Court by seizure or some equivalent act. * * * Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem;* * * * process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against him." *Pennoyer* v *Neff*, 95 U. S., 714, 727; *Wilson* v. *Seligman*, 144 U. S., 41, 44. "There is a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, * * * in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens." *Freeman* v. *Alderman*, 119 U. S., 185; *Hornthall* v. *Burwell*, 109 N. C., 10. Where the proceeding is for the enforcement of mortgages or other liens, or the condemnation of a right of way or other easement, or the partition of realty and the like, the jurisdiction as to non-residents only authorizes a judgment acting upon the property. Where the enforcement of a debt or other personal liability is sought by subjecting property of the non-resident the jurisdiction is based upon the seizure of the property and only extends to the property attached. In neither case can any personal judgment be rendered against the defendant, not even for the costs, nor affecting other property of his even within the State. *Winfree* v. *Bagley*, 102 N. C., 515. The act (1891, ch. 120) allowing service of process of this State upon a non-resident where he resides does not and cannot extend the jurisdiction. It is a convenient and probably a more sure way of bringing home to the non-resident the notice which formerly was made solely by publication. It is optional with the plaintiff which mode he shall use. *Mullen* v. *Canal Co.*, at this Term. But the service of process in another State is valid only in those cases in which publication of the process would be valid. 22 A. & E. Eve.; 137; *York* v. *State*, 73 Tex., 651. This is true also in action for divorce. *Burton* v. *Burton*, 45 Hun., 68.

In the present case, the action being for the recovery of a debt, publication of summons would have been invalid because there was no attachment of the property of defendant to confer jurisdiction. *Winfree* v. *Bagley*, *supra*. As no publication of summons would have been valid the actual service in another State "in lieu thereof" was equally invalid. The plaintiff declined the leave given him to amend his proceedings to bring the defendant into court, and the Judge therefore properly dismissed the action.

Not only has the process, issuing from one State, no extra territorial effect when served in another State (except as notice of a proceeding *in rem*, or *quasi in rem*, which could be served by publication of the notice), but even in the Federal Courts, whose jurisdiction extends throughout the Union, a personal judgment can be had against a defendant only when sued in the district where he resides. *Toland* v. *Sprague*, 12 Pet., 300. A personal judgment against a non-resident can only be obtained in a State Court when he can be found and served with process while in the State (*Peabody* v. *Hamilton*, 106 Mass., 217; *Smith* v. *Gibson*, 83 Ala., 284), or, if a corporation, by service on its agent there. It should be noted that the statute now (*The Code*, §347), as amended by chapter 77, Acts 1893, is materially different from the act in force when *Wilson* v. *Manufacturing Co.*, 88 N. C., 5, was decided. An attachment now lies for unliquidated damages arising out of breach of contract or for injury to personal or real property, but not for any other torts, such, for instance, as libel, which was the cause of action in *Winfree* v *Bagley*, *supra*. No Error.

THE RAISIN FERTILIZER COMPANY v. T. W. GRUBBS.

Arrest and Bail—Discharge—Insolvent—Exemptions—Practice—Appeal.

1. A defendant held to arrest and bail can be discharged only (1), before trial, by giving bond or making deposit; section 298 of *The Code;* (2), at the trial, by the issue of fraud or allegations of tort being found in his favor; section 316 of *The Code;* (3), after (or before) judgment against him, by payment or giving notice and surrendering all property in excess of fifty dollars; section 2972 of *The Code.*

2. Where a debtor arrested and imprisoned for fraud did not tender the oath required by sections 2968–2972 of *The Code* to the effect that he had not property of the value of fifty dollars, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by ch. 27, Vol. II of *The Code*, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was, at the date of the affidavit, insolvent and not worth more than the exemptions allowed him by law as set apart to him.

3. Inasmuch as an order vacating an order of arrest is one "affecting a substantial right" an appeal lies therefrom.

PROCEEDINGS in arrest and bail, heard by *Graves, J.*, on appeal from the order of the Clerk of the Superior Court of STOKES County discharging the defendant. His Honor affirmed and approved the order of the Clerk, and the plaintiff appealed.

Defendant was indebted to plaintiff for moneys embezzled, and, upon application of plaintiff, was arrested. Afterwards defendant gave notice of his intention to move for his discharge, and filed an affidavit stating that he had theretofore made an assignment of all his property for the benefit of his creditors, at which time he was, and ever since has been, insolvent, and not worth over the exemptions allowed by law, as set apart to him.

Messrs. Stack & Bickett, for plaintiff (appellant).
Mr. W. W. King, for defendant.

CLARK, J.: The Constitution, Art. I, sec. 10, provides that there shall be no imprisonment for debt in this State except for fraud. Even in such cases the imprisonment is not perpetual, but the debtor can be discharged upon complying with the terms of ch. 27, Vol. II of *The Code*. One of those terms is taking the oath prescribed in section 2972, that the petitioner has "not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever." This requires the surrender of homestead and personal property exemption, and, indeed, of all property of every kind in excess of fifty dollars. If this is not done the insolvent imprisoned in an action of fraud *ex contractu* remains in prison. He has his choice. The Legislature permits the fraudulent debtor to be discharged only upon those terms. It lies in the legislative discretion to fix the terms upon which such imprisonment shall end. The statute formerly permitted an imprisoned insolvent to retain his exemptions, as was held in *State* v. *Davis*, 82 N. C., 610. But upon that decision becoming known, the Legislature immediately at its first session thereafter passed chapter 76, Acts 1881, which deprived an imprisoned insolvent of the right to be discharged unless he should surrender all exemptions above fifty dollars. This act was held constitutional. *State* v. *Williams*, 97 N. C., 414. The petitioner held in arrest and bail can be discharged before judgment in cases in which he could be discharged after judgment. *Burgwyn* v. *Hall*, 108 N. C., 489; *The Code*, §2951. But neither before nor after judgment could the petitioner have been entitled to his discharge as an insolvent under chapter 27, Vol. II of *The Code*, for he has not filed the petition nor given the notice, and especially has not tendered the oath surrendering all exemptions above fifty dollars. Likewise, when the arrest and bail is an action of tort in cases authorized by *The Code*, §291, the defendant can only be discharged without payment, if the issue is found against him, in the mode prescribed by chapter 27. Vol. II. *Long* v. *McLean*, 88 N. C., 3; *Moore* v. *Green*, 73 N. C., 394. The defendant was properly held to arrest and bail under the allegations of the complaint. *Travers* v. *Deaton*, 107 N. C., 500; *Powers* v. *Davenport*, 101 N. C., 286. The question has been sometimes asked, Why hold a party in arrest and bail if, on twenty days' notice after judgment, he can be discharged as an insolvent? The answer is that if there has been fraud *ex contractu*, or if it is an action for such a tort as the statute permits the defendant to be held to arrest and bail, the constitutional protection from imprisment on the non-payment of the judgment does not apply and the Legislature gives the party the privilege of being released without payment only on surrendering "all property whatsoever" above fifty dollars. In *Moore* v. *Green*, *supra*, "the whole ground was gone over and thoroughly discussed," said RUFFIN, J., in *Long* v. *McLean, supra.* To the contention that in *Dellinger* v. *Tweed,* 66 N. C., 206, it had been held (by a bare majority of the Court) that a homestead exemption was valid against a judgment for a tort it is sufficiently pointed out that in those cases of tort in which the party can be taken in arrest and bail, while the homestead is valid against execution for the judgment, the defendant can be discharged from execution in the arrest by complying with the legislative provision which permits such discharge only upon surrender of "all property whatsoever" in excess of fifty dollars. *The Code,* §2972. A defendant held to arrest and bail can be discharged only:

1. Before trial by giving bond or making deposit. *The Code,* §298.

2. At the trial by the issue of fraud or allegations of tort being found in his favor. *The Code,* §316.

3. After judgment against him by payment or giving notice and surrender of all property in excess of fifty dollars. *The Code,* §2972. This can also be done before judgment.

Without going into the many particulars in which the defendant has failed to entitle himself to be discharged under chapter 27 of *The Code* as an insolvent, it is sufficient to point out that he has not filed the petition, nor given the notice required by that chapter, nor complied with the requirements of the oath exacted under section 2792; nor has the defendant entitled himself to be discharged upon a motion to vacate the order of arrest under section 316 of *The Code* as amended by the Acts of 1889, ch. 497. See Clark's Code, 2d Ed., sec. 316. Of course if on the trial the allegations which authorized the order of arrest and bail are found in favor of the defendant he would be discharged from the arrest, as he would likewise be before trial by giving bail or making deposit under section 298 of *The Code.*

The order of arrest was improperly vacated, and an appeal lay, as such order "affected a substantial right claimed." *The Code,* §548. Reversed.

M. O. JAMES et al. v. EUGENE S. WITHERS, Trustee, et al.

Injunction—Sale of Land Under Deed of Trust—Rights of Heirs—Administrator—Injunction Bond—Infant Parties.

1. Where J. conveyed real estate and personalty to G., taking in return the latter's bond secured by a deed of trust on the land, and after the death of J., who left no estate excepting the bond, G. reconveyed the property to the heirs and next of kin of J. in consideration of the surrender of his bond, and a public administrator, having qualified as administrator of J., requested the trustee to sell the property under the deed of trust and the heirs of J. brought suit to enjoin the sale, alleging that there were no debts, the sale wlll be enjoined until by a reference it may be ascertained whether there are any debts due by the intestate's estate and the amount thereof, if any, as well as the charges of administration, and an opportunity given to the plaintiffs to pay the same tò the administrator; whereupon, in case of such payment, a decree may be had for the cancellation of the deed of trust and a division of the property among the owners, and in case of default in such payment the injunction may be dissolved and the trustee directed to sell.
2. In such case, if it should appear from the reference that there are no debts due by the intestate's estate, there should be a decree directing the cancellation of the deed of trust upon the payment of the administration charges only, for the trustee will be entitled to no commission if there be no sale.
3. The requirement of section 341 of *The Code*, that a plaintiff shall give an undertaking before an injunction can be granted, is mandatory.
4. The simple naming of "the children of Alexander James and the children of Calvin James" as plaintiffs does not have the effect to make them parties as required under the rules of practice in the Superior Courts (17 and 16 Clark's Code, p. 724), which point out the proper mode by which minors may sue or answer.

This was an APPEAL from an order made by *Winston, J.*, at Chambers granting a restraining order until the further order of the Court. The facts appear in the opinion of Associate Justice MACRAE.

Messrs. W. W. King and *Glenn & Manly*, for plaintiff.
Messrs. Stack & Bickett, for defendant (appellant).

MACRAE, J.: The action is brought by the plaintiffs, heirs at law and next of kin of C. W. James, deceased. On the 20th of January, 1892, the said C. W. James was seized and possessed of a tract of land and certain personal property in the county of Stokes, the same as that described in the affidavit of plaintiff; on said day the said C. W. James conveyed the said real and personal property by deed in fee-simple and absolutely to one J. S. Grogan for the expressed consideration of $2,450, and upon the same day the said Grogan and his wife conveyed the same property to the defendant Eugene Withers by deed of trust to secure the payment of a bond made by said Grogan to said James for $2,350, due July 20, 1895, with interest payable annually on the 20th of July at eight per cent. per annum; the condition of said deed of trust was "that if said J. S. Grogan shall fail or neglect to pay the interest on the said bond as the same may hereafter become due, or both principal and interest at the maturity of the said bond, or any part of either, then, on the application of said C. W. James, his assignee, or other person who may be entitled to the money due thereon," the trustee should sell the property, retain the usual compensation received by trustees for making such sale, pay off and discharge the bond and interest, and pay the balance to said J. S. Grogan. On August 18, 1892, James died intestate possessed of the said bond for $2,350, and no other property.

On April 26, 1893, before the first installment of interest fell due, the said Grogan and wife, for the expressed consideration of $5, sold and conveyed all of the said real and personal property to "the heirs at law of C. W. James, deceased," in fee-simple and absolutely.

The plaintiffs allege in their affidavits that the true consideration for said deed was that, as said Grogan was unable to pay the said debt, was insolvent and under arrest, the property was to be conveyed to them, and the bond representing its purchase price was to be surrendered to said Grogan, and that the bond was so surrendered, and that some of the heirs at law took possession of the property for all of them.

Afterwards, on July 3, 1893, W. F. Campbell, the public administrator of said county, after the expiration of six months from the death of said James, duly administered upon his estate, and, after the first installment of interest upon said bond fell due and was not paid, notified the trustee Withers to advertise and sell the property according to the terms and stipulations of the said deed of trust and pay so much of the proceeds of sale as might be necessary to satisfy said bond and interest, to him, the said administrator; and the said trustee has advertised said property for sale.

Thereupon this action is brought by M. O. James, Pleasant James, William James, R. A. Neal, Frances Odell and "the children of Alexander James, deceased, and the children of Calvin James, deceased, heirs at law and next of kin of C. W. James, deceased," against Eugene S. Withers, trustee, to enjoin said sale, and have the deed of trust canceled of record, and for such other relief, etc.

The defendant and W. F. Campbell, the administrator, file affidavits in reply to that of the plaintiff M. O. James. The defendant in his affidavit denies that any part of the debt secured by the deed of trust has been paid, alleges that the administrator has served notice upon him to advertise and sell under the terms of the trust, and admits that he has advertised the property for sale. He further charges that the alleged settlement and surrender of the bond in discharge of the debt by plaintiffs was unauthorized and officious, and that the conveyance to them by Grogan and wife is void; that the real consideration was that plaintiffs would stop certain criminal proceedings against said Grogan; that plaintiffs, who are in possession of said property, are insolvent, and that their object is to cheat and defraud him out of his commissions under the trust.

The administrator Campbell files an affidavit admitting that he has taken out letters of administration; that upon taking an inventory he found no assets, except the debt of $2,350 due his intestate by a lost note, secured by the deed of trust as aforesaid, alleging further that the Commissioners of Stokes county have presented him the paper, which reads as follows: "We, the undersigned heirs at law of C. W. James, deceased, do hereby agree and consent that all expenses incurred by the county of Stokes in having the stomach of the said C. W. James analyzed, including the charge made by the chemist who analyzes the same, may be paid by the personal representative or administrator of said James, deceased, out of our distributive shares of his estate, and that a receipt to said administrator for said expenses may be and shall be a valid voucher for him in the administration of said estate. This 5th day of September, 1892." (Signed by M. O. James, R. A. Neal, William James, Pleasant James and Frances Odell). And that the estate of his intestate owes $11.25 for taxes, which sum the Sheriff of Stokes county has called upon him to pay; and he further avers that he does not know whether there are any other debts against the estate, because twelve months have not yet elapsed since his advertisement for the presentment of claims to him; and that in order to pay off the indebtedness of the estate and the charges of administration, and in order that the intestate's estate may be distributed according to law, he has called upon the trustee to sell, and the sale has been advertised; and he further avers that the plaintiffs promised to pay off the charges against the estate and the charges of the county of Stokes, but that they now refuse so to do, and that their object is to cheat and defraud the county of Stokes out of its just and lawful claim and to deprive the administrator and trustee of their reasonable and lawful charges and commissions, and that any agreement between the plaintiffs as heirs at law of C. W. James, deceased, was in their own wrong and void as to the rights and privileges of said administrator.

It appears that there are minor heirs and distributees of the estate of the said deceased, who have not been made parties to this action. The simple naming of "the children of Alexander James and the children of Calvin James" as plaintiffs does not have the effect to make them parties. The rules of practice in the Superior Courts (17 and 16 Clark's Code, p. 724, and cases there cited) point out the proper mode by which minors may sue or answer. And it appears further that the injunction order was granted by his Honor without requiring the plaintiffs to give the undertaking required by section 341 of *The Code.*

The law fully provides for the administration of the estates of deceased persons, the collection of the assets, the payment of the expenses and of the debts of the intestate, and the distribution of the balance among the next of kin. See chapter 33, Vol. I of *The Code.*

The husband or widow, the next of kin in the order of degree, the most competent creditor residing within the State, or any other person legally competent, may have letters granted to them; and when six months have elapsed from the death of the decedent and no letters have been applied for it is the duty of the public administrator to apply for and obtain them.

No one, generally speaking, has a right to meddle with the assets (not even the distributees) except the personal representative. When letters are granted the rights of the administrator relate back to the death of the intestate. Schouler on Executors, secs. 238, 239; Iredell on Executors, p. 375; *Whit* v. *Ray*, 4 Ired., 14; *Brittain* v. *Dickson*, 104 N. C., 547.

In this instance all of the assets consisted of a bond for $2,350, secured by a deed of trust upon the real and personal property named. The equity of redemption as to this property was vested in J. S. Grogan, who conveyed it all to the heirs at law of C. W. James, who were also the distributees of his personal estate. These heirs at law undertook to surrender the bond, and, as we have seen, this they had no right to do. But they took the property into their possession and succeeded to all the rights of the trustor Grogan therein.

The administrator claims the right to collect the debt upon the bond by requiring the trustee to sell, and pay to him the proceeds of sale, or such part thereof as will satisfy the bond with interest. If the trustee proceeds with the sale he must pay off and satisfy the amount due upon the bond, after first retaining his reasonable compensation for making the sale, and the surplus, if any there be, he must pay over to the plaintiffs and other *heirs at law* of C. W. James, who are the assignees of J. S. Grogan.

The administrator, having received the sum in payment of the bonds secured by the trust, must first retain his commissions; second, pay the debts of his intestate, if there be any debts; and next, pay over to the persons who are entitled to the same as distributees of his intestate, and these are the plaintiffs and the minors who have not been made parties to this action. The distributees, plaintiffs, say there are no debts to be paid, and that to sell the property, in which the distributees alone are interested, at the present time will work to them an irreparable injury, and that as the proceeds of the sale of the property to satisfy the bond will belong to them they prefer to retain the property without a sale; and they therefore ask that the sale be enjoined and the deed of trust canceled.

The trustee answers that he is called upon by the administrator to sell, and that he is entitled to his commissions upon the sale.

The administrator files an affidavit alleging that *there are* debts to be paid and that he has no assets to pay them unless there is a sale by the trustee and the proceeds thereof paid over to him.

The mutual charges of fraudulent intent seem to be more in the nature of expletives than allegations upon which questions or issues will be raised.

There is a serious controversy, then, as to whether any debts are outstanding against the estate of the intestate. If the $11.25 claimed to be owing for taxes is assessed upon the land it does not constitute a charge upon the personal estate, which the administrator is required to pay. The agreement signed by some of the distributees, plaintiffs, expresses no consideration, and does not appear to us to be a debt due by the intestate's estate. If the administrator has funds in hand to be distributed it would be a good voucher to him if he should pay over to the county the sum directed therein to be paid. The time has not elapsed, however, for the presentation to the administrator of claims against the estate, and at this stage the question is an open one, whether there are debts of the estate to be paid by the administrator.

The plaintiffs would have been entitled to the injunction if they had given the undertaking pursuant to section 341 of *The Code*, or they would have been permitted to file their undertaking here and now, if they had offered to do so in this Court. But the statute is mandatory. An injunction cannot be granted without an undertaking. *Miller* v. *Parker*, 73 N. C., 58. The injunction order must be dissolved, but the plaintiffs may apply again below, and the injunction should be ordered upon the giving of an undertaking in such sum as may be fixed by the Judge.

In order that the rights of all parties in interest may be determined the minors, next of kin of the intestate, should be made parties, and guardians *ad litem* or next friends appointed to represent them and care for their interests; and the administrator should also be made a party defendant.

If, upon the pleadings being filed, it becomes necessary there should be a reference to ascertain whether there are any debts of intestate's estate, and the amount thereof, if any, as well as the sum which will be due for charges of administration. When all parties in interest are before the Court and the indebtedness of the estate ascertained, and charges of administration, if it should be to the interest of all parties a decree may be proper, giving to the plaintiffs a day before which they may pay the same to the administrator; and thereupon a decree may be made for the cancellation of the deed of trust and a division of the property among the owners thereof. On failure by plaintiffs to pay to the administrator whatever it may be found should be paid to him, the injunction should be dissolved and the trustee directed to proceed. If there should be no debts owing by the estate, the plaintiffs being entitled to the proceeds of sale as distributees, and being also the owners of the equity of redemption, there should be a judgment directing the cancellation of the deed of trust upon the payment of the charges of administration. If there should be no sale under the deed of trust, the trustee will have earned no compensation.

The order of the Court below is reversed as improvidently made, as no undertaking was required. The plaintiffs are allowed to apply again for an injunction, to be granted upon the filing of an undertaking in such sum as the Judge below may fix. It is so ordered.

A. L. HASSARD-SHORT v. W. H. HARDISON et al.

Breach of Contract—Damages, measure of.

1. Damages for a violation of contract are recoverable only as a compensation for loss sustained thereby; if no loss accrues, or if by reasonable diligence the injured party can reduce the loss to a nominal sum, only nominal damages will be allowed.
2. Where, in the trial of an action for damages for breach of contract whereby defendants had agreed to deliver to plaintiff logs of a specified size for five years, it appeared that the defendants, in consequence of a dispute, ceased to deliver for one day, but on the next day resumed and continued the delivery until plaintiff refused to receive the logs, and that defendants were willing and able to carry out the original agreement, and plaintiff had shown, in order to fix the amount of damage, the aggregate estimated loss from defendants' failure to furnish logs with which to operate the mill for a given period, the defendants were entitled to have the Court to instruct the jury to consider in diminution any profit which the plaintiff had realized, or might by reasonable diligence have realized, by purchasing logs from others or by entering into any new agreement with defendants and continuing to saw during the same period.
3. In such case, whether the plaintiff brought his action after the lapse of a few days or at the end of the period over which the contract

extended, the damage was the difference, if any, between the contract price and the price at which, by reasonable diligence, logs could have been procured, and if there was any interval, after the breach, during which the logs could not have been bought at any price, then for such period the damage was the net profit that would have been derived from sawing and selling the number of logs deliverable by the defendants under their contract during the entire period.

CIVIL ACTION, tried at October Term, 1893, of EDGECOMBE Superior Court, before *Bynum, J.*

The action was brought for damages for an alleged breach of contract to deliver a certain number of logs of certain specified sizes for five years. It was in evidence, among other things, that on account of a dispute that had arisen the defendants ceased to deliver logs under the agreement for one day, but resumed the work of delivering the next day, and continued hauling until the plaintiff refused to receive the logs, and were willing and able to carry out the terms of the original contract. The defendants asked, among others, the following instructions:

"17. That if defendants did fail and refuse to deliver timber to plaintiff, and on the evening of the same day notified plaintiff that they were ready, willing and able to go on with the delivery of the logs, and, in fact, began the delivery of the logs on the day following, and continued to deliver the same till notified by plaintiff that he would not receive any more logs of defendants, then the plaintiff cannot recover damages for more than the said day the delivery was suspended."

"19. That in estimating the damages sustained by the plaintiff under his first cause of action, if he has sustained any, it is the duty of the jury to deduct all such sum or sums of money as the plaintiff may have realized, or might, with proper diligence, have realized, from his personal services or the operations of his mill during the entire period for which damages are assessed and for the rent of his mill, then the plaintiff can only recover the damage that he may have actually sustained for the one day on which the defendants refused to deliver the logs."

The Court refused to comply with the request, and substituted the following:

"10. If plaintiff and defendants, notwithstanding the failure or refusal of defendants to deliver logs on or about the 7th of July, got together and agreed to waive any breach that had taken place and to resume operations under the contract, and in accordance with this agreement the defendants began again the delivery of logs and were delivering when informed by plaintiff that he would not receive any more logs, then the plaintiff would not be entitled to recover for a breach in not delivering logs. If plaintiff and defendants agreed to resume under the contract without any waiver, then the measure of plaintiff's damages would be for the failure on the one day which it is admitted the defendants did not deliver logs, and that would be the difference in what it would cost the plaintiff to pay for, saw and deliver to Parmele & Eccleston, if he had the contract above mentioned with them, and what they were to pay him for the lumber."

"14. From the amount of damages you may find for the plaintiff, under the first cause of action, you will deduct such sums as the defendants have satisfied you the plaintiff has made, or by reasonable diligence might make by the operation of his mill."

Verdict and judgment for plaintiff. Defendants appealed.

Messrs. R. O. Burton and *Don Gilliam*, for plaintiff.
Mr. James E. Moore, for defendants (appellants).

AVERY, J.: The defendants agreed to deliver every day during the period of five years, covered by the contract with the plaintiff, logs sufficient in size and number to yield a certain quantity of sawed lumber, the minimum diameter being specified and the length fixed by the stipulations in the contract.

The defendants were answerable only for such damages as were the direct and natural consequence of their delinquency, not for such as were too remote. And when the aggregate estimated loss from a failure to furnish logs with which to operate the mill for a given period was shown to fix the amount as damage they had a right to demand that the jury consider in diminution any profit which it had been shown the plaintiff realized, or might by reasonable diligence have realized, by purchasing logs from others, or by entering into any new agreement with defendants and continuing to saw during the same period. 1 Sedgewick, sec. 202. It is the duty of one who is the sufferer from a breach of contract to act like a man of ordinary prudence, and reduce his damage as far as he can reasonably do so. 1 Sedgewick, sec. 205. If the defendants refused for a day to comply with their agreement the plaintiff had a cause of action, but if either the defendants or other responsible parties were willing and ready, and proffered soon after the breach, to furnish all of the logs stipulated to be furnished in the original contract at the same rate, and the plaintiff refused to purchase or receive them, preferring to allow the mill to remain idle, he had no right to recover for such time, as he made less than the profit he would have realized under the agreement, only by reason of his own obstinate refusal to renew the old or enter into a new arrangement whereby his mill might have been operated. 1 Sedgewick, sec. 205; Lawson on Contracts, 3164; 3 Parsons on Contracts, p. 194.

Damages for a violation of a contract are recoverable as a compensation for loss sustained thereby. If it appear that no loss accrues from the breach nothing more than nominal damages is recoverable. Lawson, *supra*, sec. 458; 3 Parsons, p. 176. For like reasons if by reasonable diligence the injured party in such a case can reduce the damage to a nominal sum, he is entitled to nothing more. The plaintiff was at liberty to refuse to renew the agreement after the breach, or to purchase logs from the defendants at any price, but after refusing he could not claim the same damage as though it had been out of his power to get them. 1 Sedgewick, sec. 213.

The principle being settled that the plaintiff could recover only such loss as he sustained by the breach of the contract, despite the use of reasonably diligent effort on his part to avoid the loss naturally consequent thereon, it could be applied so as to make the damage correspond to the loss accrued at any given date during the period through which the contract by its terms runs. The general principle which governs the assessment of damage in this case is stated by a well-known author (Wood's Mayne, sec. 56) as follows: "When the thing purchased is a specific article the only benefit that can be allowed for in measuring the damages will be the value of that article, or the difference between the contract price and that at which it could have been purchased elsewhere." Could the plaintiff have purchased logs of the number and description that the defendants were to furnish, after the lapse of a short interval from the first refusal of Biggs to continue to deliver, at the same price? If so, he could by reasonable diligence have avoided loss by buying them and continuing to operate his mill. If the parties had entered into a new contract, identical in terms with the original, that fact would not, in the absence of an express agreement, have amounted to a waiver of the right to sue for the breach already committed, but it would have confined the inquiry as to damages to the loss accruing between the violation of the old and the formation of the new agreement. The plaintiff might have sued at any time after the refusal of the defendants to furnish the logs as agreed upon, but whether he brought his action after the lapse of a few days or at the end of the period over which the contract extended, the damage was the difference, if any, between the contract price and the price at which logs could, by reasonable diligence, have been procured, and if there was any interval after the breach of the contract during which the logs could not have been bought at any price, then for such period the damage was the net profit that would have been derived from sawing and selling the number of logs that were to have been furnished under the contract during such period. Hare on Contracts, p. 446. The principle applicable here is analogous to that which obtains where an employee sues for the breach of a contract to employ him for a year at stipulated wages (*Markham* v. *Markham*, 110 N. C., 360) in that whenever suit may be brought the damage is subject to diminution by allowing for what the injured party might have realized from work of the same kind by the exercise of reasonable diligence.

The requests of the defendants were specific as to the question of damage, and were designed to direct the attention of the jury to the testimony tending to show that the defendants, on the very next day after ceasing to deliver logs, resumed the work and continued to haul them to the mill, until notified by the plaintiff that they would not be received. If the jury believed that testimony, and that the defendants were then willing, ready and able to carry out their original agreement from that time till the expiration of five years, it was their duty to assess the damage, upon the principle which we have stated, only for such loss as was sustained between their refusal to deliver and their resumption of the work, because the plaintiff could have avoided any loss whatever on account of failure to get logs by renewing the agreement with them. He had a right to refuse to renew the contract, but if the defendants were willing and able to perform their part according to the original stipulations, and offered to do so, he was not entitled to such damage as he sustained, because he preferred the loss rather than the renewal of former business relations with the defendants.

In refusing to give the instructions numbered 17 and 19, and the substitution for them of other instructions which failed to give the defendants the benefit of the phase of the testimony to which we have adverted, there was error. The defendants are entitled to a new trial.

We think that this error was covered by the assignment made by the defendants' counsel. New Trial.

GORDON WALLACE et al. v. J. M. GRIZZARD et al.

Evidence—Corroborative Testimony—Running Account—Instruction to Jury.

1. Where the testimony of a witness (even when he is a party to the action) is impeached he may be corroborated by showing that he has made similar statement about the transaction testified to—such corroborating testimony not being intended to prove the principal facts to be established, but to help the credibility of the witness just as evidence of his good character, etc.
2. Where, in the trial of an action of claim and delivery of property which had been conveyed by defendant to secure notes given for its purchase, the issue was whether such notes, which had been taken up by the plaintiffs, had been *paid* or *bought* by the plain-

tiffs under an alleged agreement that they were to be security for the money paid out (there being a mutual running account between the parties), the fact that the defendant, maker of the notes, made an assignment for benefit of creditors without preferring the plaintiffs could have no bearing on the case, and the defendant was entitled to have the jury instructed to that effect to remove any possible impression made upon the minds of the jury by comment of counsel on such fact.

3. Where plaintiffs and defendant had mutual running accounts and the former took up certain outstanding secured notes of the latter at various times (which were marked paid by the payees) and rendered stated accounts to the defendant showing that the amounts paid out in taking up the notes had been charged up to him, just as other items were charged: *Held*, that, in the absence of fraud or mistake, the cancellation of the notes, the rendition of the accounts and the tacit assent thereto by the debtor made the balance stated the true debt between the parties and the notes could not be revived as obligations for the payment of money without the consent of the maker, and such consent could not be presumed from the fact that he did not make any objections to an account subsequently rendered, in which the plaintiffs had separated the items of the note payments from the other items of their mutual dealings.

CIVIL ACTION, heard before *Bynum, J.*, and a jury, at Fall Term, 1893, of HALIFAX Superior Court.

The plaintiff Wallace, trustee, sought to recover possession of, for the purpose of advertising and selling, a locomotive engine which the defendant Gaskins had conveyed to the defendant Grizzard in a deed of assignment for the benefit of creditors and which had been purchased by the plaintiffs A. L. Shepherd & Co. for the defendant T. T. Gaskins from the Smith-Courtney Company of Richmond, Va., on December 22, 1891, under the following circumstances:

In the fall of 1891 said defendant began to saw lumber in Halifax county, N. C., and to enable him to carry on his operations Shepherd & Co. agreed to advance him money and supplies to the amount of $2,000. They commenced to advance him September 1, 1891. In November, 1891, Gaskins requested them to buy a locomotive for him to use in his said business. They undertook to do this, and on December 22, 1891, they made the aforesaid purchase, at which time Gaskins owed them over $4,000 on account of advances made him, being over $2,000 more than they originally agreed to let him have. No security was demanded of Gaskins for these advances, except that it was the verbal understanding between Shepherd & Co. and Gaskins that his lumber should be sold by and through them.

The negotiations for the purchase of the locomotive were carried on for Gaskins by Shepherd & Co. The Smith-Courtney Company first offered to sell if they would indorse the notes. They declined to do this, but agreed if the company would sell and take Gaskins' notes, secured by deed of trust on the property, they would see the notes paid, as they could then hold the notes as their security. The plaintiffs allege that they informed Gaskins of this arrangement, and that it was understood between them and him that the notes were to be their security, if they paid them, and that they were to hold the notes until the account for advances was first paid.

The notes, twelve in number, for $125 each, payable monthly, were then given; and at the same time the deed of trust on the property securing the same was executed and delivered to the plaintiff Gordon Wallace, with power to sell upon default, and the same day duly recorded in the Register of Deeds' office for Halifax county, N. C., where the locomotive was carried to be used in the aforesaid business.

Shepherd & Co. paid and took up all of these notes, and have kept them ever since they paid them, in an envelope by themselves, as security for the money they paid for them.

Gaskins never made any demand for them, or that the deed of trust should be marked satisfied and released, and it remains of record uncanceled.

All of these notes were deposited by the Smith-Courtney Company at banks in Richmond, Va., for collection. As they were taken up some of them were inadvertently stamped by the bank official as "paid."

Shepherd & Co. rendered to Gaskins monthly statements of his account with them from September 1, 1891, to January 1, 1893. They showed the date, amount and nature of every item advanced Gaskins to carry on his business in North Carolina, debiting him therewith, and crediting him with all sales of lumber, whether shipped direct to them or through them to other parties. These accounts were rendered as they were kept.

They entered the amount paid for each of these notes when taken up on the debit side of the general running account they kept with Gaskins, and this they continued to do until January 1, 1893, at which time they separated and took these amounts from the general account, and rendered Gaskins a separate statement, showing amount due by him on account of the locomotive purchased to be $1,558.92, and also rendered him a statement of the general account, showing to be due thereon $6,717.11, the two aggregating $8,276.03. The two accounts were kept together up to this date simply as a matter of convenience, and to show how much on all matters they had paid out for Gaskins.

Other statements of their general dealings were rendered after that date, and there was due on the general account for advances at the time of the commencement of this action over $5,000 in addition to the amount he owed on the locomotive purchase.

The above is the plaintiff's version of this transaction. The defendants controvert it in a few particulars only.

Gaskins in his testimony did not deny the correctness of the amounts he owes Shepherd & Co. as testified to by them and as shown by the accounts introduced as evidence; but he denied the agreement testified to by A. L. Shepherd that they were to hold these notes as their security, and that his general account was to be paid first; but stated that he knew the notes were secured by the deed of trust, and that he never objected to the separation of the accounts, and never demanded possession of the notes or that the deed be released; that he simply told Shepherd & Co. to pay the notes and charge the amount paid to his account—nothing said one way or the other about their holding them as security; that he knew he would need an engine, and was to pay for it the best way he could arrange; that he had nothing to pay with except the lumber; but he admitted he never directed Shepherd & Co. to apply any particular lumber to the payment of the notes, but to apply all lumber to his account.

On the trial the defendant Grizzard testified that he was trustee in the deed of trust, and that when the same was executed he knew nothing of the notes sued on, or of the dealings with the Smith-Courtney Co.; that Gaskins never told him anything about the notes before the assignment was made.

The defendant then proposed to ask the witness whether after he made the assignment Gaskins made any statement to him about the notes. This was for the purpose of corroborating Gaskins, who had testified that he instructed Shepherd to pay the notes and charge the amounts paid to his account, and that there was no agreement that he was to take up and hold the notes as an independent security, and that the notes were charged in the account, and Shepherd did not pay them until he wrote to him to do so. The question was excluded.

The counsel for the plaintiffs having referred in his argument to the jury to the fact that A. L. Shepherd & Co. in Gaskins' deed of trust were put in the fifth, or unpreferred class of creditors, the defendant requested the Court to instruct the jury as follows:

"The fact that Shepherd is not preferred in the deed of trust has no bearing on the case."

This instruction was refused.

Upon the issues submitted there was verdict for the plaintiffs, and from the judgment thereon the defendants appealed.

Mr. J. M. Mullen, for plaintiffs.

Messrs. T. N. Hill and *W. H. Day*, for defendants (appellants).

BURWELL, J.: If the testimony of a witness is impeached he may be corroborated by showing that he has made similar statements about the transaction. "The purpose of such evidence is not to prove the principle facts to be established. It is intended to prop and strengthen a witness testifying in respect to such facts, in some way impeached, by showing his consistency in the statements he makes or the account he gives of the matter about which he testifies when and when not under oath. It tends to help his credibility just as does evidence of his good character or other evidence competent for such purpose." *State* v. *Whitfield*, 92 N. C., 831. This rule applies though the witness is also a party. *Bullinger* v. *Marshall*, 70 N. C., 520; *Sprague* v. *Bond*, 113 N. C., 551. When, therefore, it was proposed to corroborate what the defendant and witness Gaskins had testified on the trial by showing by the defendant and witness Grizzard that the former had made to him a statement about the transaction in controversy it should have been allowed. The case states that "for the purpose of corroborating statements made by Gaskins while on the witness stand" the "defendant then proposed to ask the witness (Grizzard) whether after he made the assignment to him Gaskins made any statement to him about the notes." This was merely an offer to show that Gaskins had made to the witness statements about the payment or settlement of the notes about which the parties are here contending similar to the statement he had made on the witness stand. There was error in excluding the evidence, and because of this error there must be a new trial.

It is proper for us to say that we do not see how the fact that Shepherd & Co. were not preferred in the assignment made by Gaskins has any bearing on the matter here in controversy. .The issue is, Were the notes *paid* by Shepherd & Co. to the Smith-Courtney Co., or to the banks for that company, or were they *bought* by Shepherd & Co.? It could not possibly facilitate the solution of this question to inquire why Gaskins, when he saw himself under the necessity of making a general assignment, preferred one creditor over another. His Honor should have told the jury, as the defendant requested, that the fact stated above had "no bearing on the case," and thus have counteracted any possible impression made upon the minds of the jury by the remarks of plaintiffs' counsel on this subject.

Whatever may have been the purpose of Shepherd & Co. at the time of the purchase of the engine by Gaskins from the Smith-Courtney Co., it is very evident that they *paid* the eleven notes which were charged against Gaskins in the account rendered, and did not *purchase* them. We find no evidence that the Smith-Courtney Co. intended to transfer these notes to Shepherd & Co. The fact that some of them were marked or stamped "paid" consists exactly with the conduct of all the parties. The cash which Shepherd

& Co. paid out for Gaskins in the settlement of these notes was charged to him in the accounts just as was the cash paid out for merchandise. This was not an instance of a creditor holding two claims, one secured and one unsecured, and, as it seems to us, the cases of *Vick* v. *Smith*, 83 N. C., 80, and *Jenkins* v. *Beal*, 70 N. C., 440, have no application here. It seems rather to be a case of the application of payment in a running account according to the rule laid down in *Boyden* v. *Bank*, 65 N. C., 13; *Jenkins* v. *Smith*, 72 N. C., 296, and *Lester* v. *Houston*, 101 N. C., 605. When Shepherd & Co. chose to conduct this business as they did they unequivocally expressed their election to treat these notes as mere vouchers, to be used upon the settlement of the accounts between themselves and Gaskins, and not as valid, subsisting obligations of the latter. If there was no fraud or mistake the cancellation of the notes, the rendition of the accounts, and the tacit assent thereto by the debtor, made the balance stated the true debt between the parties. *Hawkins* v. *Long*, 74 N. C., 781. Thereafter their character as obligations for the payment of money could certainly not be revived without the consent of the maker Gaskins. And there seems no evidence of such assent unless it be found in the fact that when Shepherd & Co. in January, 1893, attempted for some reason to undo the effect of the accounting that had been done by them, and to separate what they were thus pleased to call the "locomotive account" from the other dealings, Gaskins did not object. We do not see that he was called upon to do so. The account then rendered showed that the notes were *paid* just as the accounts previously rendered had done.

New Trial.

T. J. GARDNER v. E. B. BATTS et al.

Homestead, assignability of—Vendee Stands in Place of Homesteader.

1. The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence.
2. A judgment debtor, being the owner at the time of the docketing of a judgment against him of White Acre, sold and conveyed it to another and received, in part payment, a conveyance of Black Acre; upon the issuance of execution he selected Black Acre, which was worth less than $1,000, and insisted upon his right to have the deficiency made up out of White Acre: *Held*, that he had the right to select his homestead in any land which he owned at the date of docketing the judgment and the deficiency, after the allotment of Black Acre, should be made up to him out of White Acre.
3. In such latter case the fact that the homesteader was an unmarried man does not affect his right to the homestead.

CLARK, J., dissents, *arguendo.*

This was a CIVIL ACTION, heard on exceptions to the allotment of homestead to J. R. and E. B. Batts, before *Hoke, J.*, at November Term, 1893, of WILSON Superior Court, upon agreed facts, as follows:

"1. An execution was issued from Wilson Superior Court July 31, 1893, returnable on the eighth Monday after the first Monday in September, 1893, on a certain judgment rendered in said Court in favor of T. J. Gardner, plaintiff, against J. R. Batts and E. B. Batts, docketed February 17, 1887. The amount due thereon was $2,165, with interest at eight per cent. from November 15, 1887, and costs, sixty cents. The said execution was issued to the use of Doane Herring, the present owner of said judgment.

"2. Under said execution J. W. Crowell, Sheriff of Wilson county, on July 31, 1893, summoned appraisers, who allotted to J. R. Batts as his homestead exemption two tracts of land, as follows:

"(*a*). One tract in Toisnot Township, known as the Mercer tract, adjoining the land of W. D. Mercer's heirs and others, containing 36½ acres, more or less, valued by the appraisers at $180.

"(*b*). One other tract in said township, adjoining the lands of Julia Braswell, Thomas Williams and others, known as the Luper tract, containing 70 acres, more or less, valued by the appraisers at $210.

"3. At the time of rendition and docketing of said judgment J. R. Batts was the owner in fee of the above two tracts of land allotted to him, and also one other tract known as the Draughn tract, situate in said county, adjoining the lands of Jesse Norris, W. D. Mercer and others, containing 184 acres, more or less.

"4. On the 21st day of November, 1888, J. R. Batts and wife sold and conveyed to one J. L. Batts the said Draughn tract for the sum of $1,500, which was a fair price for the same. On this same date the Mercer tract was worth $508.66; the Luper tract was worth on this same date $650.

"5. On the 9th day of January, 1889, J. L. Batts and wife sold and conveyed to Ella Batts, wife of the defendant J. R. Batts, the said Draughn tract for a good and valuable consideration.

"6. At the time of the allotment of J. R. Batts' homestead he, in behalf of his wife and in his own behalf, demanded that the said Draughn tract of land be assigned as his homestead, but this the Sheriff and appraisers refused to do.

"7. Under said execution the said Sheriff on the same date, to-wit, July 31, 1893, summoned appraisers, who, at the said E. B. Batts' request, allotted to him, the said E. B. Batts, as his homestead exemption one tract of land in said county, adjoining the lands of J. Batts and others, known as the "Old Place," containing 130 acres, more or less, valued by said appraisers at $600.

"7*a*. The reports of the appraisers were filed in due form.

"8. At the time of the rendition and docketing of said judgment, and prior to the issuance of said execution, the said E. B. Batts acquired other lands than the tract allotted to him as aforesaid, which will fully appear in paragraphs following:

"9. On the 20th day of December, 1887, E. B. Batts, in consideration of the above described 130-acre tract and $500, sold and conveyed to J. L. Batts the tract of land situated in Toisnot Township, Wilson county, adjoining the lands of Isaac Page and others, containing 152 acres; the consideration cited was $2,000, which was a fair price for the same.

"10. On the date of the conveyance, as set out in paragraph 9, E. B. Batts was the owner in fee of a 666-acre tract situated in said county and township, worth $4,050, on which there was a mortgage for $3,050. This was the home place of the said E. B. Batts.

"11. In the summer of 1893 the 666-acre tract was sold under the mortgage for the sum secured thereunder, $3,050, with three years' interest at eight per cent.

"12. E. B. Batts is, and was on the dates above named, an unmarried man.

"13. The said E. B. Batts, on August 4, 1893, served a written notice on the Sheriff of Wilson county, demanding that the balance of his homestead exemption be allotted to him out of the 152-acre tract sold to J. L. Batts, to which plaintiff objected.

"14. J. L. Batts came in, making himself a party to this action, so far as it is proper and necessary to do so to protect his right in respect to the homestead right, if any, acquired by him as a purchaser of the land from E. B. Batts as hereinbefore set forth, and demands that the allotment of said homestead be set aside and that the said homestead be assigned and allotted to the said E. B. Batts, or to him, the said J. L. Batts, as grantee of the said E. B. Batts, in the manner above set forth."

Upon the facts agreed his Honor rendered judgment as follows:

"1. That the exceptions of John R. Batts and wife to the allotment of the homestead be and they are hereby sustained; and it is further adjudged the Sheriff of Wilson county proceed to allot to the said John R. Batts his homestead in the lands owned by the said John R. Batts at the time of the rendition of the judgment herein, and afterwards conveyed to him by J. L. Batts and by him conveyed to the said Ella Batts, being the tract adjoining the lands of Jesse Norris and others, containing 184 acres, and known as the "Draughn Tract," at such valuation as the jury may place thereon, and if the said tract be not sufficient to give the said J. R. Batts his homestead that the deficiency be made up of such other lands as the said J. R. Batts may select.

"2. That the homestead assigned to the defendant E. B. Batts in the 130-acre tract, valued at $600, be and the same is confirmed; that there be allotted to the said E. B. Batts in the lands sold by him to J. L. Batts, containing 152 acres, adjoining the lands of Isaac Page and others, the deficiency, to-wit, $400, from such part thereof as the said J. L. and E. B. Batts may select."

The defendants excepted to and appealed from so much of the foregoing judgment as directed the allotment of a homestead to J. R. Batts out of the lands now owned by his wife and of the allotment of the deficiency of the homestead of E. B. Batts out of the land conveyed by him to J. L. Batts.

To so much of said judgment as confirms the allotment of the homestead of E. B. Batts in the 130-acre tract the defendant J. L. Batts excepted and appealed.

Messrs. Aycock & Daniels and *J. F. Bruton*, for plaintiff.

No counsel *contra*.

MACRAE, J.: These cases in no material respect differ from *Adrian* v. *Shaw*, 82 N. C., 474, and 84 N. C., 832. The principle there announced, not the first time, for it is the same in *Littlejohn* v. *Egerton*, 77 N. C., 379, is: "The Constitution vests the homestead right in the resident owner of land and authorizes him to convey it. The vendee must take it with the same quality annexed that had attached to it in the possession of the vendor; that is, to be exempt from execution for the debts of the vendor, at least during his life."

Fitting this principle to the case then before the Court, it was held that where Jackson, a resident of this State, was the owner of only one tract of land, and that worth less than one thousand dollars, and a judgment was docketed against him, and he afterwards, and before execution issued against him or a homestead was laid off to him, sold and conveyed said land, his wife joining in the deed with all the formalities prescribed in the Constitution for the conveyance of a homestead, the purchaser acquired a good and indefeasible title for the life at least of Jackson, against the creditors of Jackson, notwithstanding he may have *since* removed from the State.

It was there said by Mr. Justice ASHE: "The law, when it authorizes one to sell his homestead, would be untrue to itself and the obligations of justice if it were to allow the owner to sell it, receive a full and fair price, and then leave it subject in the hands of his vendee to the satisfaction of his debts."

While there has been much criticism of the definitions of homestead given in this and other cases, which are collected in *Vanstory* v. *Thornton*, 112 N. C., 196, *this* principle has always been recognized and followed in our decisions with the exception of the case of *Fleming* v. *Graham*, 110 N. C., 374, where a different principle was announced (although it was unnecessary so to hold in order to reach the conclusion concurred in in that case that there was no error), "that a valid conveyance of land before the allotment of a homestead is a waiver of the right of homestead as to the land thereby conveyed, and the vendee takes it subject to the lien of any judgment docketed prior thereto, but the vendor may subsequently have a homestead allotted to him in other land."

But upon a very serious consideration the Court in *Vanstory* v. *Thornton*, *supra*, recalled these expressions and stated the law to be as it had often been declared, that the homestead, by whatever definition it may be characterized, is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. By virtue of the assignment "he gets into the shoes of the homesteader." "He has bought the privilege of so standing, the privilege of personating, before the law and the judgment creditor, the homesteader himself *quoad* the homestead land." The matter was fully discussed in this case, the views of a majority of the Court being presented in the opinion of Mr. Justice BURWELL and the contrary view by Mr. Justice CLARK in a dissenting opinion. It will be unnecessary, therefore, to review the numerous decisions of this Court to show that whatever differences may have arisen upon the application of principles to ever varying phases, as they have from time to time been presented on this point, there has been "no variableness, neither shadow of turning," except in the one case last named, which this Court, for the sake of stability of decision and preservation of rights acquired thereunder, hastened to recall.

Confining ourselves strictly to the questions before us and applying recognized principles to them: J. R. Batts had a vested right to a homestead of his own selection, the quantity to be laid off according to law in the lands owned by him at the time of the docketing of the judgment. A conveyance by him and his wife under the formalities prescribed by law of those lands or any part thereof was a conveyance of such interest as he had therein. It did not release said lands from their exemption from sale under execution at the instance of his judgment creditors. And upon the issuing of execution against his property he had the right to select such portion of said land as he chose to be laid off to him by the appraisers, not exceeding $1,000 in value. The fact that such exemption enured to the benefit of the purchaser from him cannot affect or injure the rights of the judgment creditors. If he had made no conveyance at all, or if he had attempted to make a fraudulent one, his homestead right would not have been impaired, nor would the rights of his judgment creditors have been changed. He might with the concurrence of his wife convey his homestead right before the homestead had been laid off to him, as in *Adrian* v. *Shaw*, and his grantee would be entitled to precisely the same rights as the homesteader himself possessed. It might not be a difficult task to show that some at least of the alleged discrepancies in decisions upon this subject are more seeming than real and arise more because of the language used in the application of principles to particular cases than in the change of the principle itself as announced by the eminent members of this Court in the early construction of the Constitution and laws in their application to the homestead exemption.

We are persuaded that whether the conclusions reached have been entirely satisfactory to all they are at least well understood, and that it will be infinitely better to adhere to them strictly than to unsettle the law by an endeavor to change that which is now settled into a system under which counselors may advise and rights of property may be acquired and preserved with reasonable certainty.

The case of E. B. Batts stands upon the same footing and is governed by the same principle. Leaving out of view the mortgaged land which was sold under the mortgage, when the judgment was docketed against him he had a tract of 152 acres, which he sold to J. S. Batts and received in part payment therefor another tract of 130 acres. This latter tract was laid off to him at $600. He demands that the deficiency be made up out of the 152 acres sold by him to J. L. Batts. While this latter tract was owned by the judgment debtor, E. B. Batts, when the judgment was docketed against him, it was not a necessity that the whole exemption should attach to it, for no homestead had yet been laid off. By section 2 of Article X of the Constitution the owner is entitled to select the land to be exempted for him as a homestead. By virtue of section 435 of *The Code* the docketing of a judgment against him constituted a lien on his real property in that county which he had at the time of the docketing, or which he might aquire at any time within ten years thereafter. The Constitution as above referred to secured him the homestead exemption in such part of this land as he might select; there was nothing, as far as we are informed, in his contract with J. L.

Batts which bound him to select first the 152-acre tract for the exemption. He seems to have exercised his constitutional right. As the 130-acre tract was appraised at only $600 he is entitled to have a sufficient quantity of the 152-acre tract laid off to him to make up the deficiency, and this part by virtue of the conveyance to J. L. Batts enures to his benefit. The fact that the homesteader is an unmarried man does not affect his rights. Affirmed.

CLARK, J., dissenting: It was held by a unanimous Court in *Fleming* v. *Graham*, 110 N. C., 374, following the intimation in *Jones* v. *Britton*, 102 N. C. (on p. 180), that the homestead was a mere "stay of execution, nothing more, nothing less," and that being an exemption personal to the "owner and occupier" it ceased as to any particular homestead whenever conveyed away by the owner. In *Vanstory* v. *Thornton*, 112 N. C. (p. 207), the Court "recalled" the decision in *Fleming* v. *Graham* and reverted to the ruling in the older case of *Adrian* v. *Shaw*, 84 N. C., 832, which had held that the homestead right was an estate or invisible interest in the lot itself which passed by a conveyance to the purchaser of the land and protected it in his hands. Without adverting to the very full discussion of the subject in *Vanstory* v. *Thornton*, it does not seem to me that either that case or *Adrian* v. *Shaw* sustains the view taken in the present case, which goes far beyond them. Those cases, indeed, held that the homesteader could pass the homestead lot to another who could have the homestead right of the grantor vicariously imputed to himself after it had ceased to be the homestead of the grantor by his conveying it away in the manner prescribed by the Constitution.

In the present case the grantor had taken no homestead. He had conveyed the land away without having it allotted.

Some time after it ceased to be his property, and when he could no longer assert any dominion over it and had no right to even put his foot upon it, he is allowed to have it laid off to him as his homestead. The sole authority upon which it can be claimed that he can do this is the following clause in the Constitution: "Every homestead * * * to be selected by the owner thereof * * * owned and occupied by any resident of this State * * * shall be exempt from sale under execution." Was the defendant Batts the "owner" of the land set apart to him? No. Did he occupy it? No. Was it selected by the "owner"? Not at all. By his solemn deed he had long before ceased to be the owner. By his own act he had long ceased to "occupy" it. I cannot see that either by the letter or the spirit of the law he has any claim to have it set apart. Clearly this does not come within the terms of the constitutional provision. Nor does it come even within its spirit, which was to keep over a debtor's head a roof which he needs and not merely to keep his creditors from subjecting to the payment of his debt property which the debtor both by his act and deed has shown to be no longer necessary to provide him a shelter and a home.

COMMISSIONERS OF BURKE COUNTY v. CATAWBA LUMBER COMPANY.

Injunction—Floating Logs—Damage to County Bridges—Bond to Cover Damages.

In an action by a county to enjoin defendant from floating logs in certain streams and to recover damages for injury done to county bridges over such streams, on a motion by plaintiffs to continue a temporary injunction, it appeared that there was a serious issue as

> to whether or not the streams were "floatable"; that defendant had a large number of logs that would become worthless if not floated, and that an injunction would stop its mill, to the great detriment of many people, and so as to damage defendant $100 per day: *Held*, that it was proper to permit defendant to give bond sufficient to cover all damages that would probably be sustained by plaintiffs and refuse to continue the injunction.

MOTION to continue a restraining order to the hearing, heard before *McIver, J.*, at Chambers in Hendersonville, June 8, 1893.

The complaint alleges that the defendant destroyed certain bridges belonging to the plaintiffs across the Catawba river and Johns river, in Burke county, by floating logs in said rivers, and that the defendant threatens to continue to float logs therein, and in Upper creek, also in Burke county, and that the result of such threatened floating will be to destroy other bridges upon said rivers and creek belonging to plaintiffs. Judgment is asked for damages for the bridges destroyed and that the defendant be enjoined from continuing to float logs on said streams.

The defendant denies most of the material allegations of the complaint, but admits that it has, before the commencement of the action, been floating logs in the said rivers, and that it is its intention to continue to float logs therein as well as in Upper creek. It alleges further, in defence, that said streams are capable of being used for floating rafts, boats and logs, and are, in this sense, navigable streams and subject to the public use as public highways and easements, and as such have been for a long time, to-wit, more than twenty-three years prior to the commencement of this action, so used by the public and all persons desiring to float logs, rafts and boats thereon. An order temporarily restraining the defendant having been granted, the plaintiffs moved to continue it to the hearing, but his Honor dissolved the same upon defendant giving bond to secure damages to plaintiffs in the sum of $1,500, from which order the plaintiffs appealed.

Mr. J. T. Perkins, for plaintiffs (appellants).

Messrs. Charles A. Moore and *J. B. Batchelor*, for defendant.

SHEPHERD, C. J.: Many affidavits filed by the defendant seem to sustain its contention that the stream in question is what is known as a floatable stream. These, however, are squarely denied by the affidavits introduced by the plaintiffs, and hence a very serious question of fact arises which must be determined by a jury. Pending this litigation the plaintiffs asked for an order restraining the defendant from floating any logs whatever in the said stream, but his Honor, in view of all of the circumstances, refused to grant such order, but required the defendant to enter into a bond in the sum of $1,500 conditioned upon the payment to the plaintiffs of "such sum or sums as the said Board may recover of the defendant for injury that may hereafter be done to the said bridges specified in the complaint caused by the defendant, its agents or servants, in the prosecution of its business of floating logs in the stream specified in the complaint, and until the final determination of this cause." From this order the plaintiffs appeal, and it is contended that this is a case belonging to that class "where injunction is itself the relief sought and not merely ancillary, and to dissolve the injunction is to deny the relief sought and in effect to dismiss the action." While it may be true that an injunction is the relief asked for in this case it does not necessarily follow that a refusal to grant one pending the action will defeat its main purpose, as it would have done in *Marshall* v. *Commissioners*, 89 N. C., 103, and similar cases. It is not denied that the bond required by the Court is sufficient in amount to cover all damages that may probably be sustained, and it appears from the affidavits of the defendant that it has a large number of logs on the banks of the stream that will become worm-eaten and worthless if it is not permitted to float them, and that an injunction "will entirely stop the operation of said company's mill, to the great detriment of innumerable citizens of Burke county, who thereby lose the only market for their timber, and to the great and lasting loss and damage of the said company of one hundred dollars *per diem*." It is hardly to be presumed that in view of its liability upon the bond the defendant will not use proper care in floating logs during the pendency of the action, and we are of the opinion that the order of the Court is sustained by the principle upon which this Court acted in *Roper* v. *Lumber Co.*, 93 N. C., 22, in which an injunction was declined and in lieu thereof a bond was required of the defendant. The Court in that case said: "It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done unless in extreme cases, and this is not such a one." These considerations render it unnecessary at this time to pass upon the other interesting questions discussed by counsel. We think the present order should stand, but that the plaintiffs should have leave to renew their motion for an injunction should it be made to appear hereafter that the conduct of the defendant is so negligent and the probable damage and inconvenience to the public so great that the bond will prove inadequate to its protection.

Affirmed.

C. L. COFFEY v. R. P. REINHARDT.

Surety—Purchaser of Note Without Notice of Suretyship—Effect of Notice Subsequently Acquired—Statute of Limitations.

1. The lapse of three years protects the surety on a sealed instrument.
2. Although a bond is joint and several on its face the suretyship of an obligor may be shown by parol, but to obtain protection by the lapse of three years the surety must show that his relation was known to the creditor.
3. If the suretyship of the surety is known to the original payee and the note be assigned after maturity the surety will be protected by the lapse of three years after maturity, although the assignee takes without notice; otherwise if the note be assigned before maturity to one without notice.
4. If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations.

SHEPHERD, C. J., dissents, *arguendo*.

CIVIL ACTION, tried before *Boykin, J.*, and a jury, at January Special Term, 1894, of CALDWELL Superior Court.

The defendant W P. Reinhardt testified that he signed the two notes hereinafter set out as surety, and his evidence was not contradicted.

The plaintiff testified that at the time he became the owner of the said notes he had no knowledge or notice that said W. P. Reinhardt was surety thereon. He testified that he purchased said notes before their maturity and for full value; that some time before suit was brought (the exact time not fixed by the evidence) from certain conversations with the defendants he suspected, but did not know, that W. P. Reinhardt was surety, and in December, 1892, addressed a letter to W. P. Reinhardt, in which this line occurs: "I hold a note on you as surety to R. P. Reinhardt." The notes are as follows:

"On or before April, 1883, we promise to pay Azor Shell, Jr., two hundred dollars for value received, with interest from date, this March 25, 1882.

"R. P. REINHARDT, [Seal.]
"W. P. REINHARDT, [Seal.]

"Witness: J. H. BURNS."

The other note was similar in form, but dated March 23, 1882, and was due in November, 1883.

There were divers credits on said notes, the last being dated March 1, 1889.

The defendant W. P. Reinhardt requested the Court to charge the jury: "If the plaintiff knew that the defendant W. P. Reinhardt signed the notes as surety at any time more than three years before the bringing of this action he could not recover as against him."

The Court declined to so charge, and the defendant excepted.

There was a verdict for the plaintiff, and from the judgment thereon defendant W. P. Reinhardt appealed.

Motion by W. P. Reinhardt for a new trial; motion refused.

Mr. M. L. McCorkle, for defendant (appellant).

No counsel *contra*.

CLARK, J.: The lapse of three years protects the surety on a sealed instrument. *Welfare* v. *Thompson*, 83 N. C., 276. Although the bond is joint and several on its face it can be shown by parol that a party thereto is a surety.

The Code, §2100; Brandt on Surety, sections 29 and 30. When the suretyship does not appear upon the face of the bond the surety must show that it was known to the creditor to obtain protection by the lapse of three years. *Goodman* v. *Litaker*, 84 N. C., 8; *Torrence* v. *Alexander*, 85 N. C., 143. When the suretyship is known to the original payee the surety is protected by the lapse of three years if the note is assigned after maturity, although the assignee takes without notice. *Capell* v. *Long*, 84 N. C., 17. Otherwise if it is assigned before maturity to one who takes without notice. *Lewis* v. *Long*, 102 N. C., 206.

This sums up the direct authorities in this State. In the present case it is not controverted that the defendant is in fact surety on the bond, and that it was assigned to the plaintiff before maturity for value and without notice. Nothing else appearing, the plaintiff was entitled to recover. *Lewis* v. *Long*, *supra* But the Court was asked to charge that if the plaintiff received notice after assignment that the defendant was surety and notwithstanding delayed more than three years after maturity and after such notice to bring suit the surety is protected. In refusing so to charge there was error.

Whatever the form of the bond one who is in fact a surety thereon is protected by the lapse of three years after maturity. The exception is when the payee has no notice of the suretyship or assigns the bond before maturity and for value to one who takes without notice of the suretyship. Here the plaintiff, after maturity of the bond, received notice that defendant was surety, yet failed for more than three years to bring action. The reason that the surety would not be protected by the lapse of three years, to-wit, that the holder of the bond was not put on his guard to collect in that time because he did not have notice of the suretyship, or assigned it before maturity to one who took for value and without notice, no longer applies. *Ratione cessante, cessat et lex.* A somewhat similar case is where the holder or assignee of the instrument takes it without notice of the suretyship, but after learning that fact gives time to the principal. This releases the surety. 1 Brandt on Suretyship, section 32; *Luman.* v. *Nichols,* 15 Iowa, 161; *Wheat* v. *Kendall,* 6 N. H., 504; *Overand, Gurney & Co.* v. *Oriental Financial Corporation,* 7 English and Irish Appeal Cases, 348.

It is true the surety could give the holder written notice *quia timet* to bring suit under *The Code,* sections 2097, 2098, and if the holder does not do so within thirty days the surety would be released. *Cole* v. *Fox,* 83 N. C., 463. But here the holder merely has verbal notice, not a *quia timet,* of the suretyship. The plaintiff, fixed with the knowledge of that fact, delays for more than three years to sue. By reason of such laches such surety is protected by the lapse of three years. Error.

Shepherd, C. J., dissenting: I know of no statute which repeals the well-settled principle that a purchaser, after maturity or with notice, from one who purchased before maturity and without notice, is fully protected against any defences existing between the maker and payee of a negotiable bond or note. See *Lewis* v. *Long,* 102 N. C., 206, and the authorities cited. The indorsement made under such circumstances fixes the rights of the parties, and in the absence of additional legislation I am unable to see how the action is barred by the statute of limitations. It is true that under our statute or by suit *quia timet* the holder might have been compelled to sue the principal, but the bare fact that a *bona fide* holder discovers the relationship of the parties subsequently to the indorsement cannot, in my opinion, put in operation the statute of limitations. No authority, I think, can be found for the position, and I am not prepared to give my sanction to so radical a change in what I believe to be a well-established principle in the law of negotiable paper.

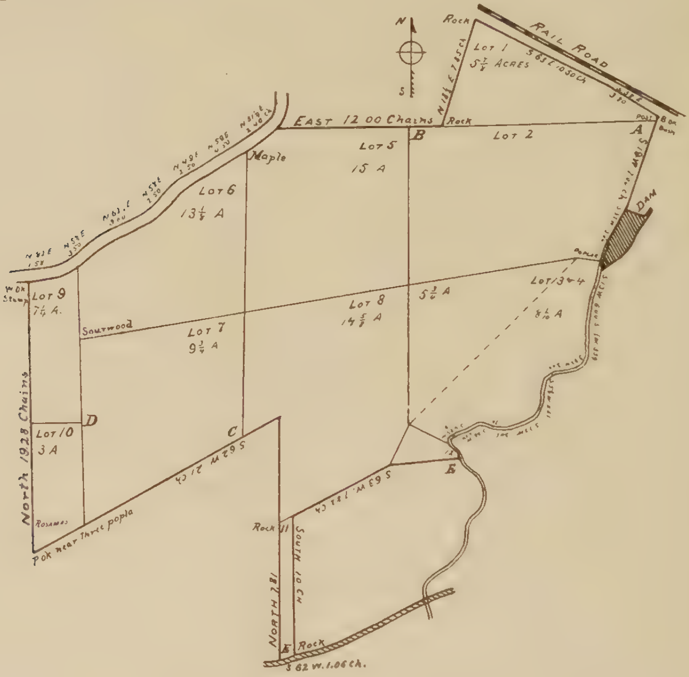
JAMES NORWOOD v. SAMUEL CRAWFORD.

Boundaries—Establishing Lines—Survey—Control by Monuments—Duties of Surveyor in Proceedings Under ch. 22, Acts of 1893.

1. The natural order of survey being that which a deed shows the parties thereto adopted to identify, to their own satisfaction, the land intended to be conveyed, the true rule in a subsequent survey to establish boundaries is to run with the calls in regular order from a known beginning, following course and distance, and the method of ascertaining a previous line in the order of description by reversing cannot be resorted to unless by that method a greater certainty of identification of such prior line can be obtained than the deed itself gives in its description of that line.
2. Where, in a description in a deed, the point of beginning and the three last corners were monuments, and, in running in regular order by courses and distances the several lines between the point of beginning and the second monument, the line from the corner next preceding such monument to such monument passed outside the monument, the true rule was to run such line to the monument, disregarding course and distance, and not to survey the lines from the point of beginning in reverse order.
3. Under Acts 1893, ch. 22 ("An act to enable owners of land to establish the boundary lines thereof"), the surveyor appointed by the Clerk is not a referee, and his report should not contain conclusions of law. (Duties of surveyor under the act discussed by AVERY, J.).

SPECIAL PROCEEDING for the establishment of boundary lines under ch. 22, Acts of 1893, heard before *Brown, J.*, at Fall Term, 1893, of ORANGE Superior Court.

The surveyor appointed by the Clerk of the Court, after the filing of the petition and answer, made his survey and reported as follows:



"The above represents the Norwood and Crawford survey of lands situate in Orange county, North Carolina, near Hillsboro.

"Direct survey of the Norwood tract: Lots Nos. 3 and 4, beginning at poplar on pond, thence south thirteen degrees west four chains and seventy-eight links, and up branch as indicated by black lines, ending at E, one chain and fifty links beyond stone; thence dropping back to stone and running north nine chains eighty-two links to rock; thence south eighty and one-half degrees east one chain and sixty links to the beginning, containing per estimate twelve acres.

"Reverse survey of lot No. 3, beginning at poplar on pond, thence with red lines north eighty and one-half degrees west one chain and sixty links to rock; thence south forty-four and one-half degrees west sixteen and seventy-seven one hundredths chains, passing stones fifty-five links; thence from stones holding all the distances with exact reverse calls, running with red line ending at point B in the pond, in connection with lot No. 4, containing fourteen acres.

"From the rules by which surveys are governed we conclude that the true survey begins at poplar on pond running strictly by courses and distances called for by notes of lots Nos. 3. and 4 in connection, up branch as indicated by black lines until the survey connects with the Whitted line; thence along the Whitted line to a point due south of stones; thence north to rock P; thence north eighty degrees east twelve chains to rock; thence south eighty and one-half degrees one chain and sixty links to beginning. The poplar, rock F, rock D (B) and stones (A) being on the bearings and distances correct, we think, shows the error of original survey to be on the measurement from poplar up branch to point E, and not on the courses; therefore we conclude that the black is the true and exact line as run by the first surveyor."

Exceptions were made to the report by the plaintiff, and the Clerk rendered the following judgment:

"It is considered and adjudged that the true boundaries of the Norwood tract mentioned in the complaint in this cause are as follows: Beginning at a poplar (P) on Crawford's pond and running as called for in Norwood's deed, south 13 degrees west 4.78 chains, as indicated by black line on map; thence south $1\frac{1}{2}$ degrees west 3.29 chains; thence south 82 degrees west 3 chains; thence $5\frac{3}{4}$ degrees west 2.65 chains; thence 73 degrees west 3.45 chains; thence north 58 degrees west 70 links; thence south $66\frac{1}{2}$ degrees west 2.50 chains; thence south 48½ degrees west to Alston Whitted's line: thence with his line to pile of stones (A), or if pile of stones is not on Alston Whitted's line then to a point in his line directly south of said pile of stones; thence north to rock B 9.82 chains; thence north 80 degrees east 12 chains to rock F; thence south 80½ degrees east 1.60 chains to the beginning. It is further ordered that George W. Tate, County Surveyor of Orange county, run and mark said boundaries as determined in this judgment and make a report, together with a map of the lines as determined, which said report and map shall be filed with the judgment roll in this cause and entered with this judgment on the special proceedings docket of this Court.

"It is also adjudged that the plaintiff, James Norwood, pay the costs of this proceeding."

Upon the hearing of the appeal from the judgment of the Clerk before his Honor no issue was tendered by either party.

The Court examined the surveyor at request of defendant's counsel relating entirely to an explanation of his plat and the method of surveying. After argument the Court rendered judgment as follows:

"The Court is of the opinion that the controversy between the parties arising upon the pleadings and the report of the surveyor involves only a question of law as to how the boundary in question shall be ascertained. It is admitted on the argument and by the surveyor that stones A and the three several points on the map marked "Rock" and the beginning poplar are well known and undisputed. It appears from the report and the oral examination and explanation of his survey of the surveyor, Tate, had at instance of defendant's counsel, that the direct courses of the deed, if run, would strike none of these points. The

Court is of opinion that the location of the line can be secured with more certainty by beginning at the poplar, the admitted beginning, and reversing the calls of said deed and running all of said line in accordance therewith by the reverse course until point C on the map reported by the surveyor is reached on red line, and thence a direct course to the known beginning, the poplar. No report is made as to finding the branch referred to in first call in the deed, and the surveyor appears not to have been able to locate it. It is ordered that the judgment of the Clerk confirming the report of the surveyor be reversed; and it is further ordered that the boundaries of lots 3 and 4 be run as follows: Begin at poplar on the dam and running north 80½ west 1.60 chains to rock; then south 80 degrees west 12 chains to rock; then south 9.82 chains to pile of stones; then with Alston Whitted's line south 61½ east 3.50 chains; then north 48½ east 79 links; then north 66½ east 2.50 chains; then south 58 east 70 links; then ---- 73 east 3.45 chains; then north 5¾ east 2.65 chains; then north 82 east 3 chains; then north 1½ east 3.29; thence direct line to the beginning at said poplar on dam.

"The courses in the first call of the deed should be disregarded, as a natural object is called for. The surveyor, G. W. Tate, will run and mark the lines as herein directed and fix a stone at letter C. It is ordered that the costs of the cause be taxed against the defendant, except one-half surveyor's fees and expenses, which shall be taxed against plaintiff."

The appellant, Samuel Crawford, excepted to the rulings of his Honor and appealed, assigning as error:

"1. The Court erred in holding that the line should be run by a reverse survey from the calls as set out in the complaint and admitted in the answer, and insisted that the surveyor should be directed to run and mark the dividing line between the plaintiff and the defendant, beginning at the poplar and then running the line according to the calls claimed by the plaintiff in his complaint and admitted in the answer.

"2. That the Court erred in attempting to find as facts matters not put in issue by the pleadings, for if there were matters of fact to be tried they were properly to be tried by a jury, which was demanded by the appellant and refused by his Honor, the Court holding that only a question of law was presented by the record, and proceeded to examine the surveyor and finds that certain points, to-wit, stones A and three several points were well known and undisputed, etc., when the pleadings show that the defendant only claims the lands from the poplar to the end of the second call in plaintiff's complaint, and could not, therefore, know of any of the objects located by the Court or the other lines as set out in the judgment and findings of the Court."

Mr. J. W. Graham, for plaintiff.

Messrs. J. A. Long and *C. D. Turner*, for defendant (appellant).

AVERY, J.: PEARSON, Chief Justice, referring to the case of *Harry* v. *Graham*, 1 Dev. & Bat., 77, said, in delivering the opinion in *Safret* v. *Hartman*, 7 Jones, 203: "It is decided in that case that a posterior line could not be reversed in order by its intersection with the prior line to show the corners unless such posterior line was certain, because to do so would be to extend the distance of the prior by the course of the posterior line. The chance of mistake resting on the one or the other being equal, it was deemed proper to follow the order in which the survey was made." If the measurements of lines in all original surveys had been accurate instead, as we continually observe, of falling far short of monuments reared as corners, and if all surveys were laid off in squares or equilateral triangles it might make no material difference whether surveyors should run backward or forward from any admitted corner in order to locate the boundary lines. But where by running with the calls a different result from that attained by reversing is necessarily reached or may ensue the safer and more certain method of following the order of the original survey by the interested parties who directed it is, as a rule, adopted. *Harry* v. *Graham*, *supra.* We find no case in our Reports where this Court has given its sanction to the correctness of a survey made by reversing the lines from a known beginning corner. The rule is to run with the calls in regular order from a known beginning and to resort to the test of reversing in the subsequent progress around the boundary only where the terminus of a call cannot be ascertained by running forward, but can be fixed with absolute certainty by running reversely the next succeeding line.

Leaving out of view the other exception and conceding for the sake of the argument that the defendant waived the right of "trial by jury" upon any issues "raised before" the Clerk, to which the statute (ch. 22, Laws 1893) provided that he should be entitled on the hearing "*de novo*" in the Superior Court, we propose first to discuss the sufficiency of the reason given by the Court for directing that the survey should be made, contrary to the general rule, by reversing the lines from an established beginning corner. It was admitted that the poplar, the beginning, was at a known location. "Course and distance from a given point is a certain description in itself, and therefore is never departed from unless there be something else which proves that the course and distance stated in the deed was thus stated by mistake. * * * So with reversing the line. The party cannot have recourse to that method of ascertaining a previous line in the order of description unless by reversing he gives a more certain means of identifying the prior line than the deed gives in its description of that line itself. The natural order of survey is that which the deed shows the parties to the deed adopted to identify, to their own satisfaction, the land intended to be conveyed by the one to the other. It may be considered as their direction how the identity shall be established by survey at any future time and it supposes certain points as the beginning to be established." *Harry* v. *Graham, supra,* pp. 78, 79. In our case it seems that running from a known poplar as a beginning and following the calls of the deed, no established corner would be found at the end of the distance for a number of successive calls, except that the Court finds that there was a natural object called for at C, but it does not appear that the description of course and distance, according to the report of the survey referred to by the Court, was wanting in any one of such calls, and there is no evidence in these unfailing directions for reaching a succeeding station of mistake, whether C was or was not the terminus of the first call. The learned Judge who heard the case below seems to have rested his opinion upon the fact that the beginning at P and the three last corners, F, B and A, located respectively at rocks and a pile of stones, were admitted to be at the points indicated on the map, and that in running by course and distance the calls of the deed in regular order and without variation that for the stones would pass south of the true station (at A) to the hand marked M, and thence to D instead of B. It is manifest that the Court acted upon an erroneous view of the rules of surveying established in the two leading cases which we have cited and in many others. The beginning being fixed, the true rule was to run the calls when course and distance were given and locate the corners accordingly, unless testimony was offered to identify some corner called for and locate it at a longer or shorter distance from the point of departure. *Redmond* v. *Stepp*, 100 N. C., 212. When the station next preceding the stones (at A) was reached by actual measurement, the next corner (at A) being identified, the succeeding line should have been run to the known point (at A), disregarding course and distance, because a corner ascertained by usual marks or located by agreement of the parties (as the stones were) becomes in contemplation of law "a fact incorporated into the deed so as to make it a part of the description" (*Safret* v. *Hartman, supra*, p. 204) and is thereby made more certain than the actual measurement on the line called for. The invariable rule seems to require that the lines shall be run from a known beginning according to direction and distance if given in the order in which the parties originally ran and arranged them, but if a call is reached in the regular order which either by a failure to specify distance or by fixing the corner on a line of another tract makes its terminus uncertain and by reversing the next succeeding call from a known point the location of the line or point called for can be made certain, then that mode of surveying becomes proper only because it plainly tends to the attainment of the leading object in making all surveys—certainty of location. If, for instance, the first call in the deed by which the surveyor ran had been for a point in the line of another tract, and thence with such line a given distance to a third corner, which was admitted to be at a certain point on said line, it would have been proper to reverse the call from the third corner so as to ascertain the point at which a prolongation of the first line would intersect with that of the adjacent tract. The same course would be pursued, and for a similar reason, where in the case supposed course but not distance was given in the first call and the line of the adjacent tract was known to be marked from the third corner to a point at which running by course the first line would intersect with it. *Harry* v. *Graham, supra; West* v. *Shaw*, 67 N. C., 439. If, however, the location of the beginning point itself had been left in doubt and could be fixed as a mathematical certainty by the description that it was at a certain distance and a certain course from a point, ultimately called for as the corner, immediately preceding the beginning in returning to the latter, the line would be run from such last corner in order to determine where the beginning was located. *Cowles* v. *Reavis*, 109 N. C., 417.

It is stated as a fact in the judgment of the Court that the surveyor appeared not to have been able to find "the branch referred to in the first call." In his report the surveyor describes the line, recommended by him, as running up a branch, both in the first and third paragraphs of it. But however that may be, the Court relieves us of the trouble of discussing the bearing of this discrepancy on the case, when it is stated as a conclusion of law based upon an assumed fact (the admitted location of a corner at C) that course and distance should be disregarded in running the first line because a natural object is called for at C. If that be true, then manifestly the first call should have been run to such known point, and the succeeding lines according to course and distance, until a known or admitted corner should be called for, as at A. *Cowles* v. *Reeves, supra; Buckner* v. *Anderson*, 111 N. C., 572. Accepting as true the facts stated by the Court, as leading to the opinion that greater certainty would be attained by reversing the lines, we conclude, therefore, that there was error in the judgment of the Court even if we concede that the right of trial by jury had been waived by the defendant, since upon the admitted facts stated by the Court the lines should have been run from the known beginning by course and distance, if no more certain evidence of location was shown, and in regular order. The reasons given by the Court were not sufficient to justify a departure from the general rule.

For the reasons given a new trial must be awarded to the defendant, and it is unnecessary to pass upon the question whether the defendant waived his right of trial by jury. It may not be amiss, however, as this is the first appeal involving the construction of the late statute (Acts of 1893, ch. 22), the object of which is manifestly to make processioning of land at last the means of adjusting controversies as to boundaries, to volunteer a suggestion as to the duties of surveyors appointed by the Clerks under the act. It was not contemplated that the surveyor should be treated in any sense as a referee, or should in his report give the Court the benefit of his conclusions of law. He is required to survey the lines according to the contention of each of the parties and to make a map in which shall be designated, by lines and letters or figures, the boundaries as claimed by each. His report should show by what deed or deeds he surveyed, at the request of either, and the successive calls surveyed,. with detailed accounts of the measurement by course and distance, also of the marked trees or corners claimed as such, and what was the nature and appearance of the marks, whether course and distance were disregarded in running any given line, whether any steps were taken to ascertain the age of the marks on line trees and corners, and all other facts developed by such survey as would tend to enlighten a Court or jury in the trial of a controversy as to boundary. We are led to make this suggestion by the fact that the deeds by which the surveyor ran are not mentioned in the record, nor are the descriptions contained in them set forth. We infer what were some of the calls of the deeds attempted to be located from the meager statement of the controverted points and admissions contained in the judgment and the report of the surveyor, which was referred to by the Court as one of the sources from which the facts on which his judgment is based were ascertained. That report, however, does not go sufficiently into details, and it would have been more satisfactory, if there was no controversy as to facts, had the Court incorporated into the judgment a full statement of every material admission of either of the parties.

New Trial.

I. S. EASTMAN v. COMMISSIONERS OF BURKE COUNTY.

Action to Recover Property—Demand—Damages.

1. The owner of a building on another's land cannot recover damages for withholding possession without first making a demand and being refused permission to enter and remove it.
2. The owner of a building on another's land cannot recover, as damages for its detention, the rental value thereof, but only the actual damages suffered by such detention.

This was a CIVIL ACTION, tried at Special Term, 1894, of CALDWELL Superior Court, before *Boykin, J.*, and a jury.

The plaintiff brought his action to recover a lot in the town of Morganton, Burke county, N. C., and, second, to recover a certain frame building situated on said lot, and certain tools and other personal property contained therein.

On the trial of said action, his Honor having intimated that on the evidence the plaintiff was not entitled to recover on his first cause of action, the plaintiff submitted to and took a nonsuit thereon.

It was in evidence, and it appears from the pleadings, that the keys of the house sued for and the house itself were delivered to the defendant Board of Commissioners in December, 1890, and same adversely to the plaintiff. A lease was also introduced in evidence by the defendant from the defendant Commissioners of Burke county to Rufus Avery wherein they let to said Avery a certain lot in Morganton from the 3d day of January, 1881, to the first day of January, 1891, upon the following conditions, to-wit: "That said party of the first part is to have the privilege of digging an ice-house and erecting a building for marketing purposes, but is not allowed to sell or allow to be sold spirituous liquors on the premises, and to have the use and occupation of said lot for ten years, commencing January 3, 1881, and ending January 1, 1891.

"The party of the second part is to pay to the parties of the first part and their successors in office, on the first day of January of each and every year, the sum of ten dollars rent, the first payment to be made on or before January 1, 1882, and the tenth and last on the 1st January, 1891. And at the expiration of the ten years, to-wit, on the first day of January, 1891, the said party of the second part is to surrender the possession of the said lot upon the payment, and if agreement as to the value cannot be decided upon the party of the second part is at liberty to remove said building off the premises, but is not to damage the ice-house. The parties of the first part bind themselves and their successors to carry out the terms of the above agreement, and the party of the second part binds himself and his heirs, executors, administrator and assigns to carry out the terms of the above agreement, and in default of the payments above set forth the same shall be a lien upon said building."

The plaintiff introduced in evidence a deed from Rufus Avery to himself, dated 23d January, 1892, conveying the said house and its contents (consisting of butcher's tools, etc.) to the plaintiff and his heirs, the conveyance being only made to assure the title to the property therein conveyed, the sale thereof having been made to the said I. S. Eastman before and purchase-money paid on the 4th day of April, 1891.

It was further in evidence, and uncontradicted, that the rental value of said house was $40 a year.

His Honor stated that, there being no conflict as to the facts in regard to the second cause of action, the right of the plaintiff to recover the house was a question of law on the evidence and pleadings, and without objection he should find the issues, which he did, as follows:

"Is plaintiff the owner of the house described in the complaint? Yes.

"What is the annual rental value of said house? $40."

This issue was answered by the Court by consent of defendant. And thereupon his Honor rendered judgment for plaintiff, and defendants appealed.

Messrs. J. T. Perkins and *S. J. Ervin*, for defendants (appellants).

Messrs. I. T. Avery and *M. Silver*, *contra*.

BURWELL, J.: Upon the argument of this appeal it was agreed between the counsel of the appellants and the appellee that the "case" should be amended so as to show that the appellants duly excepted to the construction put by his Honor on the lease and deed set out in the record, that exception having been omitted by an oversight in making up the statement of the case on appeal.

An examination of the plaintiff's complaint discloses the fact that he was not seeking by this action to enforce his alleged right to remove from the land of the defendants a house which he had erected thereon under a contract which secured to him that privilege and damages because that had been denied him. In the statement of his first cause of action he distinctly avers that he is the owner in fee of the land, and demands possession as such owner. In the statement of his second cause of action he declares that in the year 1891, while he was in the peaceful possession of the house the defendants unlawfully took possession of it and have since that time wrongfully withheld the possession thereof from him, thereby causing him "to lose the use of said house and the property therein contained." He nowhere alleges a desire or right to remove the house, or that the defendants have refused to allow him to do so. It appears that these allegations were not sustained by the evidence produced on the trial. All went to show, as seems to have been conceded, that after January 1, 1891, neither the plaintiff nor his assignor, Rufus Avery, the lessee, had any right to remain on the defendants' land, or any right to come upon it except for the purpose of removing their property therefrom.

He alleged one cause of action, as it seems to us, and attempted to establish quite a different one. And of the cause of action which he thus sought to enforce at the trial a demand and refusal were an essential element. The defendants could not be held liable for damages in such a case unless they had prevented him from exercising his right. Damages could only arise out of a refusal to allow him to remove the house. Now, not only was there no allegation or proof of a demand and refusal, but there was on the part of the defendants a distinct averment of a notification to the lessee to remove the house off of their land.

The pleadings and facts found do not support the judgment entered against the defendants. If the house is the plaintiff's, in the sense that he may take it away from the defendants' land, it does not follow that he may recover damages of them. He must go a step further and prove that they refused him the privilege of removing it. And the damages recoverable would be, not the rental value of the house situated as it was on the defendants' land, but the actual damage suffered by the plaintiff because he was not allowed to remove it. There must be a

New Trial.

J. K. SIMPSON v. KATHERINE ELWOOD et al. (two cases).

Suit on Accounts—Splitting up Accounts—Jurisdiction.

One who has an account against another consisting of several distinct items based on separate transactions may bring an action upon each distinct and separate item, provided that if he should bring more actions than are necessary to avail himself of the jurisdiction of a Justice of the Peace the Court may, to prevent oppression and unnecessary costs, require a consolidation of the actions; but if, before action brought, the plaintiff renders a statement covering all the items contracted at different dates, to which no objection is made by the debtor within a reasonable time, the account becomes an account stated and cannot be then split up.

This was an ACTION on account, commenced before a Justice of the Peace and brought by appeal to the Superior Court of RUTHERFORD County and tried before *Armfield, J.*, at Special Term, 1894.

It appeared that plaintiff, who was a retail merchant, claimed to have sold to defendants on different dates a number of small items of goods, none of which items amounted to more than $25. This was a running account extending over two or three years, and had never been liquidated nor any part of it paid. That the aggregate amount of the items was $295.10 and interest. The plaintiff brought two suits before a Justice of the Peace to recover the said sum.

One suit embraced a number of the said items, aggregating $149.77 and interest. The other suit embraced the remainder of the items, and was for $145.43 and interest.

The Court held that the plaintiff could not "split up" his account and give a Justice of the Peace jurisdiction, and dismissed the said suits for want of jurisdiction. From the judgment so dismissing the action the plaintiff appealed.

Messrs. Justice & Justice, for plaintiff (appellant).
Messrs. McBrayer & Durham, for defendants.

MACRAE, J.: The plaintiff had a right to bring his action upon each distinct item or transaction. If, however, he should bring more actions than were necessary to avail himself of the jurisdiction of a Justice of the Peace the Court would, to prevent oppression and the unnecessary burden of costs, require him to consolidate his actions. The leading case upon this subject is *Caldwell* v. *Beatty*, 69 N. C., 365.

If, however, the plaintiff had rendered his account to defendants, covering a statement of all the items contracted at different dates, and no objection had been made thereto by defendants within a reasonable time, it would have then become an account stated, and he could not thereafter have separated the items so as to sue on them before a Justice of the Peace. *Marks* v. *Ballance*, 113 N. C., 28.

Where a *single* contract is made for furnishing articles at fixed prices the plaintiff will not be permitted to "split up" his account. *McPhail* v. *Johnson*, 109 N. C., 571. There is a suggestion in the brief of defendants' counsel that the case on appeal and the record will show a single contract by one of the defendants for the payment of the whole account, by means of which it is contended that this case is brought under the principle last laid down, but we find nothing in the "case" or in the record to warrant this contention. Reversed.

A. T. CURTIS v. PIEDMONT LUMBER COMPANY.

Contract, breach of—Void Contract by Vendee—Action by Vendor.

Where a contract for the sale of personal property was void the seller cannot, by virtue of the same or by reason of any mere technical acceptance under it and where there has been no delivery to and conversion by the vendee, recover the difference between the contract price and the amount for which the vendor, after tender, afterwards sold the property.

CIVIL ACTION, tried at Spring Term, 1894, of MCDOWELL Superior Court, before *Shuford, J.*, and a jury.

The case has been before this Court twice (109 N. C., 401, and 113 N. C., 417), and the facts stated in the reports of those appeals are substantially the same as govern in this appeal.

There was judgment below for the plaintiff, and defendant appealed.

Mr. W. J. Peele, for plaintiff.

Messrs. S. J. Ervin and *Avery & Silver*, for defendant (appellant).

PER CURIAM: The defendant was entitled to the following instructions, which were refused by the Court:

"3. The Court instructs you further that the contract in this case being void the plaintiff cannot recover by virtue of the same or by reason of any mere technical acceptance under the terms of said contract, but in order to recover the liability must have been incurred by reason of the acts of defendant outside of and independent of any contract whatsoever, and such acts must amount to an actual taking and conversion of the property of the plaintiff by the defendant to its own use, and there being no evidence of such taking or conversion by the defendant, the Court instructs you to answer the first issue, No."

It is very evident that the defendant never actually received the logs, and that, in order to fasten a liability upon it, the plaintiff must make out his case through the alleged contract. This contract was void under the statute, and this Court has decided that there can only be a recovery "where the corporation has received and availed itself of property sold and actually delivered to it." *Roberts* v. *Woodworking Co.*, 111 N. C., 432; *Curtis* v. *Piedmont Co.*, 109 N. C., 401.

This is substantially an action upon the contract in which the vendor, after tender, has sold the property and sues for the difference between the amount brought and the contract price. As the statute has been repealed (Acts 1893, chs. 84 and 388) it will serve no useful purpose to further discuss its provisions. Reversed.

A. J. HAMILTON v. J. P. ICARD et al.

Action to Recover Land—Evidence—Adverse Possession—Color of Title—Grant—Lappage—Interruption of Possession by Grant of State—Statute of Limitations.

1. Though it is not necessary to show continuous and unceasing possession of land for the statutory period of twenty-one years in order to raise a presumption of a grant from the State, but only that in the aggregate the actual possession has extended over such period, yet, where written evidence of title is offered as color merely, the possession must be manifested by unequivocal acts of ownership such as would have subjected the occupant not simply to an action of trespass *quære clausum fregit*, but to a possessory action at common law.

2. Though one has color of title to land he acquires title by adverse possession to none by planting some part of it in tobacco every year for more than the statutory period, no part being planted for more than two years, and each part being inclosed only for the time it is cultivated.

3. Though plaintiff in an action for land fails to show a grant from the State, or adverse possession for sufficient time to bar the State, he may avail himself of the subsequent introduction by defendant of a patent to prove adverse possession for such period as will bar defendant.

4. The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State (*The Code*, §139, subd. 2)—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage.

5. Under *The Code*, §141, providing that no action shall be had against one who has been in possession of land, under color of title, for seven years, by one having right or title thereto, except during the seven years next after his right or title shall have descended or accrued, the statute begins to run against one to whom a grant of the land has been made only from the time of the grant.

CIVIL ACTION, tried before *Boykin, J.*, and a jury, at January Special Term, 1894, of CALDWELL Superior Court.

The plaintiff introduced deeds to him and those under whom he claimed running back to 1869 and embracing the *locus*. Among those under whom he claimed were one Barringer and one Barrier.

I. N. Beard testified: "I am County Surveyor. I have surveyed the land conveyed in the above deed; the land granted to the defendants is embraced in the 425-acre tract conveyed to Hamilton, save 7½ acres; the defendants' grant is for 152 acres; I surveyed it; I saw signs of plant beds on the 425-acre tract; the defendant May directed me to run the line of the grant so as to exclude the plant beds; he said he wanted to keep off any one's possessions, and he went ahead and when he saw a bed he would turn me aside. The 425 acres were all forest land, except an old clearing around the shoals; the clearing had not been cultivated; the timber cut on it was decayed; there were no signs of a fence. Tobacco beds are where the seed are sown to make plants."

Witnesses testified for the plaintiff that the land was very well adapted to the growing of tobacco, and that they had seen tobacco plants growing in beds in the forests. I. T. A. Spencer testified that in 1870 he burned a tobacco bed on the land with the permission of Barringer, and from 1871–'75 he used the same bed with the permission of Barrier. He said: "The stock law was adopted two years ago; the beds were fenced before that. I quit raising tobacco ten or twelve years ago. Then I burned beds ten years in succession by Barrier's consent. In 1870 I burned a bed 20 x 20 feet. I put a rail and pole fence around it. In 1871 I burnt about same place, taking in some new land and leaving off some of the old bed. I saved the rails each year for the next. Each year I'd take the edges of the old bed and burn new land. Perhaps I'd keep half the old bed. In 1873 I burnt a large bed; think I was on new land entirely then. In 1874 used same bed. In 1875 burnt a new one. I burnt by permission of Barringer two years; the other years by permission of Barrier. Don't know that any one of the beds was on the land granted to defendants. Tobacco beds are usually 10 or 15 by 10 or 15 feet."

W. F. Deal testified: "I have seen tobacco beds on the 425 acres; I remember one year, 1871, distinctly; Spencer had charge of the land; I don't know whose land it was. After 1871 Spencer gave me permission to burn a bed there one year; can't tell what year it was. I don't know whose beds they were. The bed I saw there in 1871 was in a swamp. I think it was fifty or sixty square rods. There were logs and poles around it and it was covered with brush. It appeared that the logs and poles were put there to keep the brush from falling away from the bed. I burnt my bed one-half a mile from the bed I saw in 1871; part was on an old bed, part was on new land. A great many people burnt beds on the 425-acre tract; quite a large place was taken up thus. It is fine tobacco land; there are the finest shoals in the county there. There has been no cultivation of any part of the land. Hamilton worked there two or three weeks. There is the finest body of timber on it in our county. The land is peculiarly adapted to growing tobacco plants. Spencer gave me permission to burn my bed."

B. M. Satterthwaite testified: "I have known the boundary since 1872; I burnt my bed there that year by permission of Barringer. The bed was 10 x 15 yards; it was a new place. I fenced the bed to protect it from stock. I burnt the land, grubbed it, then sowed the seed. Got the wood to burn it from this land. There have been beds burnt on it every year since. My father has burned beds on it every year since save 1880 and 1881, when he burnt on my land. Sear, Teague, Spencer and Pressly have burnt beds on it every year since 1871. Father burnt there by permission of Barringer and Barrier. Father and I burnt beds there till 1877, then I burned on my own land. We burnt our beds on the same places all the time. We had two beds. We sowed seed in February and took up the plants in May. It is good corn and wheat land. Tom Eaton put Mrs. Beach there twelve years ago; he built a house for her and planted two or three acres in wheat. She only remained there two years. There is a little house on defendant's grant; I saw it there about a year ago. The fence remained around our bed during the year until we got ready to burn again; then it was taken down and after the burning was replaced."

There was other testimony by other witnesses to the same effect, and also that plaintiff had paid taxes on the land since he got his deed.

Defendants introduced a grant from the State to Morgan May, C. S. Hinkle and Julius Icard, dated 20th September, 1892.

The land granted is embraced in the deed to plaintiff.

There was testimony on part of the defendants that there were no burnt beds, etc., on the grant.

The defendants requested the Court to instruct the jury that the plaintiff's possession was not of such character as to perfect his defective title. The Court intimated that the jury would be so instructed. The plaintiff submitted to a nonsuit in deference to this opinion of the Court and appealed.

Messrs. Edmund Jones and *M. Silver*, for plaintiff (appellant).

No counsel *contra*.

AVERY, J.: The action was brought on the 30th of November, 1892. The plaintiff proposed to show title under a Sheriff's deed for 2,425 acres, executed May 22, 1869, and several mesne conveyances, for a tract containing 425 acres, included within the boundaries of the older deed. Plaintiff introduced no grant from the State, but defendant offered a patent for 152 acres bearing date September 21, 1892, which it was admitted embraced the whole of the *locus in quo.*

In order to raise a presumption of a grant from the State it is not necessary to show continuous and unceasing possession. *Reed* v. *Earnhardt*, 10 Ired., 516. A break of two or three years in the chain of possession on a failure to show the connection between successive occupants is not a fatal defect in the proof where in the aggregate the actual possession has extended over the statutory period. *Mallett* v. *Simpson*, 94 N. C., 37; *Cowles* v. *Hall*, 90 N. C., 330; *Candler* v. *Lunsford*, 4 Dev. & Bat., 407; *Davis* v. *McArthur*, 78 N. C., 357; *Bryan* v. *Spivey*, 109 N. C., 66. But where, as in the case at bar, written evidence of title is offered as color merely, the possession must be manifested by unequivocal acts of ownership, such as would have subjected the occupant not simply to an action of trespass *quare clausum fregit*, but to a possessory action at common law. *Gudger* v. *Hensley*, 82 N. C., 482; *Logan* v. *Fitzgerald*, 87 N. C., 308; *Osborne* v. *Johnson*, 65 N. C., 22; *Williams* v. *Wallace*, 78 N. C., 354; *Bartlett* v. *Simmons*, 4 Jones, 295 "The possession will not divest a superior title to any part outside the actual occupancy" (said the Court in *Scott* v. *Elkin*, 83 N. C., 427) "for the reason that no action could be maintained by the true owner, and a constructive possession, not exposing one to an action, does not take away or impair an uninvaded legal right." *Ruffin* v. *Overby*, 105 N. C., p. 78. Occasional entries upon different parts or even upon the same portion of the land for the purpose of cutting timber may subject the trespasser to several actions for damage (3 Blk., 212), but are not considered as assertions of right in the land. *Ruffin* v. *Overby*, *supra; McLean* v. *Smith*, 106 N. C., 179.

Applying the principles we have stated to the facts of this case, we are of opinion that the planting of tobacco beds in different places not upon the same spot for more than two successive years, though continued for the statutory period, would not constitute an actual possession such as would mature title, since the occupancy does not divest title beyond its actual bounds (*Scott* v. *Elkins, supra*) and is therefore not continuous as to any one spot. If as to any particular portion of territory it is a continuous, open, notorious and unequivocal assertion of right, the law extends the benefit of such a possession of a spot, however small, by raising the presumption that it was held in the assertion of a claim to the limits of the occupant's paper title. *Ruffin* v. *Overby*, 88 N. C., 369; *McLean* v. *Smith, supra.* The evidence of the witness Spencer does not show such a continuous occupancy of any particular portion of the land for more than two years. *Morris* v. *Hayes*, 2 Jones, 93; *Williams* v. *Wallace*, 78 N. C., 354; *Loftin* v. *Cobb*, 1 Jones, 406; *Bastlett* v. *Simmons*, 4 Jones, 295. He sometimes used a part of an old tobacco bed a second year, but not oftener, before removing the rails entirely off it and ceasing to inclose it at all. The witness Preswell testified, however, that between 1879 and 1885 (before the latter year) his father cleared a portion of the land, as the lessee of the plaintiff, and inclosed it. Taking the testimony of that witness with that of Palmer and Deal, the jury might have been warranted in finding that the land was kept inclosed and either cultivated or used as a pasture for more than seven years before the action was brought, on the 30th of November, 1892.

Where a claimant subjects the land to some use of which it is susceptible in its present state and at such intervals as to indicate unmistakably that he means to be considered as claiming the ownership and not to commit an occasional trespass simply, such occupancy is sufficient (*Williams* v. *Buchanan*, 1 Ired., 535; *Bynum* v. *Collin*, 4 Ired., 310), and especially if he subjects it to the only use of which it is susceptible. *Tredwell* v. *Riddick*, 1 Ired., 56. Where land is used for agricultural purposes it is not essential that the claimant should cultivate it constantly, but only in accordance with usages prevailing among husbandmen. It is not material whether a field is cultivated in grain or corn, or is kept inclosed for a pasture when needed, so that it be used every year in the ordinary way for some purpose connected with the business of tilling the soil. But there was no testimony tending to show a continued occupancy for twenty-one years, such as would mature title as against the claim of the State.

The statute (*The Code*, §139) provides that the State "will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the State to the same * * * when the person in possession or those under whom he claims have been in possession under colorable title for twenty-one years, such possession having been ascertained and identified under known and visible lines and boundaries." Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without *prima facie* proof of possession under colorable title for twenty-one years. But where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. *Gilchrist* v. *Middleton*, 107 N. C., 680. And even where the plaintiff fails to make *prima facie* proof of title because he is unable to produce a grant from the State or prove possession for a sufficient number of years to bar the State, "he is not precluded from taking advantage" of the subsequent introduction by the defendant of a patent covering the *locus in quo*. *Gilchrist* v. *Middleton*, *supra; Boomer* v. *Gibbs*, at this Term.

But where it is conceded that the defendant's grant dated the 20th September, 1892, for 152 acres embraces the land in dispute and precludes the State from any claim of title it may be contended, upon the authority of *Brown* v. *Potter*, Busbee, 461, that the possession of the plaintiff was interrupted upon its issuance and that the statute did not run thereafter. The head-note of that case justifies the contention, but upon examination into the facts it is shown to be manifestly misleading. The question raised there was whether the issuance of a grant lapping over the visible boundaries to which an adversary claimed under an actual *possessio pedis* without any written evidence of title whatever, and including no part of the land occupied when it was issued, would draw to it the constructive possession which, in the absence of adverse occupancy, is always incident to the better right. The Court said (page 463): "The case in that aspect presented at the trial the ordinary one of the lappage of two grants, neither party being in the actual possession of the lappage. The title to the *locus in quo* at the time the action was brought was in the lessors of the plaintiff and drew to it the possession, which possession was not disturbed until the taking of the possession of the small portion mentioned in the case." In a previous paragraph of the opinion stress seemed to be laid upon the fact that no color of title had been shown by the defendant and, in a subsequent paragraph, that up to 1834 he (Potter, the father of the defendants, and under whom they claimed) had acquired no title, and after that time his possession ripened his title only to that portion of the land within his boundaries not covered by the grant to Brown."

The Court say that the doctrine announced was "fully recognized and established by the case of *Carson* v. *Mills*, 1 Dev. & Bat., 546." The Court then stated the principle decided in the last named case, as follows: "It is there determined if a part of a tract of land be covered by two titles and he who has the better title be in possession of another part of it he has in law the possession of the whole, unless the person holding under the other title has the actual possession of the interference." That was, therefore, the case of a lappage where, because neither party was seated in the interference, the law gave the constructive possession to the holder of the better title. The only authority cited besides *Carson* v. *Mills* was *Smith* v. *Bryan*, Busbee, 183, where the same point was decided, but the reasons more clearly set forth. It is evident that the Court intended to distinguish a case where the contesting occupant was claiming under color of title from that before them a *possessio pedis* without proper title, since they said, *arguendo*, "These grants overlapped, and the case states that neither party was in the actual possession." Quoting from *Bynum* v. *Thompson*, 3 Ired., 578, it was said further "that where one enters on land without any conveyance or other thing to show what he does claim, how can the possession by any implication or presumption be extended beyond the occupation *de facto?* To allow him to say he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with his claim, would be to hold the ouster of the owner without giving him an action therefor." The point decided in *Bynum* v. *Thompson* was that where one enters under a deed he is presumed to claim to the boundaries of his conveyance; when he occupies without deed, only to the extent of his *possessio pedis*. The opinion in *Brown* v. *Potter*, therefore, is not susceptible of the interpretation that the possession of an occupant claiming under colorable title by virtue of possession for twenty-one years is necessarily interrupted *ipso facto* upon the issuance of a grant lapping upon the boundary of such occupant, where it does not appear that there was an entry and counter-possession of the interferance under the grant. Upon the execution of the patent the benefit of a possession without paper title is confined to the actual *possessio pedis*, but occupation of the interference by those claiming under a grant is necessary in order to limit the constructive possession of one who is seated on the lappage and claims under color of title for twenty-one years.

In ascertaining whether the plaintiff had acquired title by possession under color for twenty-one years the time that elapsed between the issuing of the grant and the entry of the defendants upon the lappage might have been counted in order to make up the full period under a fair construction of section 139 (2). If such intervening time had been sufficient with the previous occupancy the grantee could not complain if the effect of the grant was to place him in the shoes of the State with the right possessed by the State to stop the running of the statute, by entry or action, before the end of the twenty-one years. But as the testimony restricts the plaintiff to the claim by virtue of colorable title for seven years under section 141 of *The Code* a very different question is presented. That section provides that "no entry shall be made or action sustained against such possession except during seven years after his right shall have descended or accrued." The right of the defendants did not accrue till the grant was issued, and therefore the seven years' statute (section 141) did not begin to run as against their right till the 20th of September, 1892.

We cannot lay down the rule as applicable in all cases that the issuing of a patent covering a tract of land which does not appear to have been theretofore granted deprives an occupant on the land of the benefit of his previous adverse holding. Where an occupant is seated on the interference when the overlapping grant is issued, and is claiming colorable title adversely to the State under section 139 (2), the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. *Boomer* v. *Gibbs, supra.* If, on the contrary, the occupant of the lappage wishes to use his adversary's grant to show that the title is out of the State in order to establish it in himself, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant.

There was no error in the intimation of the Court that the plaintiff was not in any view of the testimony entitled to recover, and the judgment of nonsuit is

Affirmed.

F. V. HENDRICK, Administrator, v. GIDNEY & WEBB et al.

Administrator—Unauthorized Transfer of Assets of Estate as Security for Individual Debt—Right of Administrator De Bonis Non.

1. Where an administrator, before the settlement of the estate, pledged a note belonging to his intestate's estate as collateral security for his individual debt, the transferee having full notice of its character at the time it was transferred, an administrator *de bonis non* of the estate may recover the note from the transferee.
2. In such case the fact that the former administrator, at the time he made the misappropriation, was a creditor and distributee of the estate cannot affect the right of the administrator *de bonis non* to administer upon all the personal property not already administered.

CIVIL ACTION, tried at Spring Term, 1893, of CLEVELAND Superior Court, before *Armfield, J.*

Upon the reading of the complaint and answer and after the jury was impaneled his Honor held that plaintiff was entitled to recover upon the pleadings, and gave judgment accordingly. No issues were submitted. The defendants appealed.

The complaint alleged, in substance, that one W. P. Wray, after qualifying as administrator of E. L. Bostic, filed a petition for license to sell the real estate of intestate for the payment of debts; an order was granted and at the sale the defendant T. E. McBrayer became the purchaser at the price of $400, of which he paid $100 in cash and gave his note for the balance as follows:

"$300. On February 1, 1892, I promise to pay W. P. Wray, administrator of Eugenia Bostic, deceased, three hundred dollars, with interest at eight per cent. from date, balance of the purchase-money on the Eugenia Bostic house and lot, adjoining C. R. Doggitt and myself, on LaFayette street, in the town of Shelby, N. C. This note entitles me to a conveyance in fee-simple of the title to said property upon its payment.

"This September 25, 1891.

"T. E. McBRAYER, [Seal.]"

That afterwards the said Wray delivered said note to the defendants Gidney & Webb, without indorsement, as pretended collateral security for individual debts of the said Wray which they had in their hands for collection; that Gidney & Webb had knowledge of the character of said note, the purpose for which given, the representative capacity of the payee, and of the fact that said W. P. Wray had same in his representative capacity only, and that individually he had no rights in or claim upon it, and full knowledge of all the equities existing at the time they received said note from said W. P. Wray; that said W. P. Wray was removed as administrator of said Eugenia Bostic, deceased, for cause upon petition, and the plaintiff on ----day of ------duly qualified as administrator and at once entered upon the discharge of his duties as such; that no part of said note has been paid, but all of same, together with interest, is still due and owing the plaintiff by the defendant T. E. McBrayer; that no deed has been made for said lot to said T. E. McBrayer and cannot be under the decree of the Court until the payment of said note, but plaintiff is ready to execute and will execute said deed upon payment of the aforesaid note; that the plaintiff as administrator aforesaid is entitled to the possession of said note and has demanded same of Gidney & Webb, but they have refused to deliver same to plaintiff.

Judgment was demanded against Gidney & Webb for the possession of said note, and against T. E. McBrayer for the sum of $300, with interest, etc.

The defendants Gidney & Webb in their answer admitted the allegations of the complaint except so much of it as alleged that said note was a pretended collateral and so much as alleged that the plaintiff was entitled to the possession of the note.

For a further answer defendants alleged that the note referred to in the complaint "was delivered to defendants in good faith as collateral security to claims held by defendants Gidney & Webb against the said W. P. Wray and that said claims are still due and owing by the said W. P. Wray.

"That the bond executed by the said W. P. Wray as administrator of E. L. Bostic is good and the whole thereof is collectible.

"That the said E. L. Bostic, at the time of her death, was largely indebted to the said W. P. Wray, and at the time said note was turned over to defendants Gidney & Webb the larger part of the note aforesaid belonged as a matter of law to the said W. P. Wray. That the said W. P. Wray is an heir of E. L. Bostic and as such is entitled to a part of said note.

"That the said W. P. Wray is indebted to F. V. Hendrick, administrator aforesaid, as defendants are informed and believe, and the object of the said F. V. Hendrick is to get possession of the note aforesaid and apply the proceeds thereof to said indebtedness.

"That the said W. P. Wray filed a petition to sell the real estate for which the aforesaid note is given before the Clerk of the Superior Court of Cleveland County, and in said petition he alleged that said indebtedness of his intestate was about $300."

Mr. R. L. Ryburn, for plaintiff.
Mr. J. L. Webb, for defendants (appellants).

MACRAE, J.: The admissions of the defendants entitle the plaintiff to the judgment rendered by his Honor, there being no issues for the jury. It is true that administrators having the legal title to the assets of their intestate's estate may sell or pledge them, or may discount notes of the estate, if the exigencies of the estate make it advisable for them so to do, and that parties dealing with them will be protected, provided the transaction be fair and honest. But "it is settled law that when a person gets from an administrator, or other person acting in a fiduciary capacity, the trust fund or any part of it as payment of the trustee's own debt, that person cannot hold the fund from the *cestui que trust* any more than the original trustee could." *Gray* v. *Armistead*, 6 Ired. Eq., 74; *Wilson* v. *Doster*, 7 Ired. Eq., 231.

As between the administrator Wray, who was also a creditor and a distributee of the estate of his intestate, as appears by the answer, which we take to be entirely true, and the defendants, no question might have arisen if the administrator Wray had settled the estate, paid its debts, and distributed its assets according to law.

But this administrator has been removed and the plaintiff is now the administrator *de bonis non;* the duty is devolved upon him of collecting the assets and disposing of the same according to law. He finds that the former administrator has pledged to defendants, as collateral security for the payment of his own indebtedness, a note belonging to the estate and bearing notice of its character upon its face. The fact that the former administrator, at the time he made this misappropriation of the assets, was a creditor and distributee of the estate cannot affect the law which requires of the administrator *de bonis non* to administer upon all of the personal property not already administered. It is not claimed that there are no other parties interested in the distribution of assets or payment of debts than the former administrator. It is admitted that this note, representing land sold to pay the debts of the intestate, has been pledged and is now held by the defendants with full notice of its character at the time it was received as collateral for the payment of the individual debts of the former administrator. The bare statement of the facts carries with it the conclusion that the note belongs to the plaintiff.

Judgment Affirmed.

E. J. HEATH AND WIFE, ANNIE M., v. EVA HEATH et al.

Construction of Deed—Grantee In Esse—Unborn Children.

Under a deed to a woman "and her children" a child *en ventre sa mere* at the date of the conveyance will take, but children born more than a year thereafter will not.

PETITION for the sale for partition of land, filed before the Clerk of MECKLENBURG Superior Court and, upon demurrer being filed by defendants, transferred to the Judge of the District and heard by consent before *McIver, J.*, at Chambers in Hendersonville, December 5, 1893.

The petition alleged that Joseph McLaughlin by deed dated in January, 1881, conveyed the land described in the petition to the *feme* plaintiff, Annie M. Heath, "and her children."

"2. That at the time said deed was executed by the said

Joseph McLaughlin, the father of the said *feme* plaintiff, she had no child born, but the defendant Eva Heath was born within two months from the date of said deed; and the other defendants, Eula Heath, Henry Heath and Etta Heath, were born to the said *feme* plaintiff and her husband, E. J. Heath, more than twelve months from the date of said deed.

"3. That the *feme* plaintiff and the defendant Eva Heath are seized and possessed of said lands in fee-simple, as tenants in common, as the plaintiffs are advised and believe, each being entitled to an undivided one-half interest therein, under the deed from the said Joseph McLaughlin, as aforesaid; the other defendants having no interest in said lands, but claiming to be tenants in common with the *feme* plaintiff therein.

"4. That the *feme* plaintiff desires to hold her share of said land in severalty, and that actual partition thereof cannot be made without great detriment to the parties concerned.

"5. That all of the defendants are the children of the *feme* plaintiff and her husband and co-plaintiff, E. J. Heath, and are all minors under the age of twenty-one years."

A guardian *ad litem* was appointed for the infant defendants, Eula, Henry and Etta, who demurred to the petition upon the following grounds:

"1. For that it appears from the facts set forth in the petition and Exhibit 'A' attached thereto that these defendants are tenants in common with their co-defendant and the *feme* plaintiff in the lands described in said petition and entitled to share in the proceeds of a sale of the same for partition.

"2. For that it appears from the facts set forth in the petition and exhibit (deed) attached thereto that all of the children of the *feme* plaintiff, now born or hereafter to be born, are or will become tenants in common with the *feme* plaintiff in the lands described in said petition, and as the *feme* plaintiff and her said husband are living partition of said land cannot be had until possibility of issue by her shall become extinct."

His Honor overruled the demurrer and remanded the case to the Clerk to be proceeded with, and from this judgment the defendants Eula, Henry and Etta appealed.

Messrs. Walker & Cansler, for plaintiffs.

Mr. H. H. Covington, for defendants (other than Eva Heath) (appellants).

SHEPHERD, C. J.: In the case of *Dupree* v. *Dupree* (Busb. Eq., 164) it was decided that by a conveyance like the present where a child *en ventre sa mere* is to take directly and not in succession the child can take nothing. The reason assigned by PEARSON, J., is because "there being no trustee to keep the uses open, the conveyance must take effect immediately or not at all." "There must be a grantor and a grantee and a thing granted." Although it appeared, as it probably does in this case, that the children to be thereafter born were to take as tenants in common with their parent, the principle above mentioned, after a learned discussion, was applied in the following language: "We have no sort of doubt that the grantor intended all the children of Robert and Rachel Dupree, * * * without reference to the time of their births, to be participants of her bounty; and the only regret is that she did not call upon a lawyer who would have drawn a conveyance passing the property to a trustee by which the uses could have been kept open until the death of Mrs. Dupree so as to let in all of her children. But she chose to make a common law conveyance directly to the children; and of course no other could take under her deed of gift except those *in esse*, or, as my Lord COKE expresses it, *in rerum natura*, when the right of property passed out of her, to-wit, at the date of the deed of gift." See also, *Gay* v. *Baker*, 5 Jones' Eq., 344; *Hunt* v. *Satterthwate*, 85 N. C., 73; *Hampton* v. *Wheeler*, 99 N. C., 222; 1 Delvin Deeds, sec. 123.

The law as thus declared is still in force and is only modified in so far as it affects a child *en ventre sa mere*. *The Code*, §1328. From this it must follow that Eva, who was *en ventre sa mere* at the date of the conveyance, is the only child who takes any estate thereunder. For a full discussion of the subject the reader is referred to *Dupree* v. *Dupree*, *supra*. The judgment must be Affirmed.

WILLIAM T. WILKINS et al. v. JOSEPH SUTTLES.

Action to Recover Land—Pleading—Estoppel—Counter-claim for Substantive Relief—Nonsuit—Practice.

1. One who enters into a tract of land under a written contract of purchase is a tenant at will of the bargainor, and is estopped from denying the latter's title in an action of ejectment against him to recover possession.
2. If, after an estoppel has arisen, the existence of the contrary fact is averred by one of the parties, the other may show it by pleading it if it be not already apparent on the record; but if, having the opportunity to do so, he fail to plead and rely upon it, and answer to the fact and again put it in issue, the estoppel, when offered in evidence, loses its conclusive character and may be repelled by opposite proof. Where, however, the pleadings are general, as in actions of ejectment, etc., the party having no opportunity to plead it, the estoppel retains its exclusive character, and the jury must find according to it.

3. In an action for the recovery of land the complaint, instead of being general, as usual, alleged that the defendant entered into possession under a contract of purchase with plaintiff's ancestor and, therefore, as his tenant, but never complied with the terms of the purchase; and the defendant answered that his father entered under a contract of purchase with plaintiff's ancestor and paid the purchase-money, and that, after the death of defendant's father, the plaintiff's ancestor fraudulently procured the defendant, in ignorance that the land had been paid for, to make a new contract of purchase; the plaintiff replied, denying that the purchase-money had been paid, as alleged in the answer, and denying the allegation of fraud, but did not plead that defendant was estopped to deny that he was plaintiff's tenant by reason of defendant's occupation of the land under the contract of purchase: *Held*, that the Court properly submitted the single issue as to the controverted fact whether defendant's father had paid for the land.
4. Where the defendant, in an action to recover land, sets up a counterclaim for substantive relief the plaintiff is not entitled to take a nonsuit.

CIVIL ACTION to recover land, tried before *McIver, J.*, and a jury, at Fall Term, 1893, of RUTHERFORD Superior Court.

The complaint was as follows:

"1. That they are the owners and are entitled to the immediate possession of a tract of land lying in Rutherford county, N. C., joining lands of William Miller, James Roberts and others, where defendant now lives, containing about thirty-three acres.

"2. That defendant and those under whom he claims entered into possession of said tract of land by contract of purchase from one J. H. Wilkins, an ancestor of plaintiffs, S. J. Tillinghast and W. T. Wilkins.

"3. The only title defendant has, as plaintiffs are informed and believe, is that derived from said J. H. Wilkins by contract of purchase.

"4. That plaintiffs and defendant both claim title to said land under and through said J. H. Wilkins.

"5. That defendant has failed to comply with his part of the contract of purchase above alleged by failing to pay the purchase-money agreed.

"6. That the continued possession of defendant is wrongful: Wherefore plaintiffs demand judgment for possession of said land, for damages and costs of this action, and for such other and further relief as the nature of the case requires."

The defendant, after denying absolutely allegations 1 and 6 of the complaint, and the others as stated therein, for further defence said:

"1. That on or about the -- day of ----, 1855, Isaac Suttles, father of this defendant, entered into possession of the land described in the complaint under a contract of purchase with the ancestor of plaintiffs, J. H. Wilkins, and said Isaac Suttles in his life-time fully paid said J. H. Wilkins the purchase price of said land, and in all respects complied with his part of the said contract, and the said J. H. Wilkins failed and neglected to perform his part of the said contract and failed to make title to the said Isaac Suttles as he had contracted to do, but received the full purchase price of said land, to-wit, $150, before the death of said Isaac Suttles, to-wit, about 1860.

"2. That said Isaac Suttles is dead, and Joseph Suttles, the defendant, and others are his only heirs at law.

"3. That Isaac Suttles, by reason of the above-mentioned contract and the performance of the said Suttles' part of same, became the owner of a complete equity in said land and was entitled to have a deed executed to him by J. H. Wilkins.

"4. That, after the death of the said Isaac Suttles and after his interest in said land had descended to his heirs at law, J. H. Wilkins fraudulently procured this defendant to enter into a contract to purchase said land, this defendant not then knowing that the said Isaac Suttles, ancestor of defendant, had fully paid the said J. H. Wilkins for said land and was entitled to have a deed executed to him for same.

"5. That, since the facts of the defendant's ancestor's contract of purchase of said land and his paying for same came to this defendant's knowledge, this defendant has refused to pay for said property again, and this defendant and his father under whom he claims said land have been in possession, claiming said land as their own, since about 1855.

"6. That said contract of purchase between J. H. Wilkins and Isaac Suttles is lost and can be proven only by parol testimony.

"7. That this defendant and his ancestor have put valuable and permanent improvements on said land under a *bona fide* claim of ownership.

"Wherefore defendant prays judgment that the plaintiffs, heirs at law of J. H. Wilkins, be required to execute a title in fee-simple to said tract of land and to this defendant:

"Or that the plaintiffs be required to pay this defendand other heirs of Isaac Suttles, $150 paid by Isaac Suttles, and interest on same from 1860 until date, together with $300, the value of the permanent improvements placed on said premises by the defendant."

The plaintiffs' replication was as follows:

"1. In replication to paragraph 1 plaintiffs admit that the defendant came into possession of the land in dispute under contract of purchase made by his father from one J. H. Wilkins, the ancestor of plaintiffs and the person under whom they claim, the defendant renewing said contract of purchase in writing, but they deny that the defendant or those under whom he claims ever paid for said land or any portion of the purchase-money, and the same is still due and owing.

"2. The second and sixth paragraphs are admitted.

"3. The third, fourth and fifth paragraphs are denied.

"4. The seventh paragraph is not true. If defendant or those under whom he claims have made any improvements whatever upon said land they are not worth near so much as the rental value of land. Plaintiffs aver and allege that the rental value of the said land is worth much more than the improvements, and demand judgment for $500 and damages."

The plaintiffs tendered the following issues:

"1. Are plaintiffs the owners of and entitled to the possession of the land described in the complaint?

"2. Did defendant enter into or get possession of said land by and under contract with plaintiffs' ancestor, J. H. Wilkins?

"3. Has defendant complied with or fulfilled his part of said contract?

"4. Is defendant wrongfully withholding the possession of said land from plaintiffs?

"5. What damages, if any, are plaintiffs entitled to?"

The defendant tendered the following issues:

"1. Did Isaac Suttles, the ancestor of defendant, pay J. H. Wilkins, ancestor of plaintiffs, in accordance with contract of sale referred to in paragraph 6 of further answer and admitted by plaintiff?

"2. Did Joseph Suttles, at the time he entered into contract of purchase with J. H. Wilkins, as alleged in complaint, have actual or constructive knowledge of the prior contract between J. H. Wilkins and Isaac Suttles, and that said contract had been complied with?"

The Court submitted the following issues, to which the jury responded as follows:

"1. Did Isaac Suttles, the ancestor of defendant, pay J. H. Wilkins, ancestor of plaintiffs, in accordance with the contract of sale referred to in paragraph 6 of further answer and admitted by plaintiff? Answer, Yes.

"2. Is the plaintiff entitled to the possession of the land in controversy? Answer, No.

"5. What damages, if any, are plaintiffs entitled to recover? Answer, ----."

During the trial, and after part of the testimony was in, the Court intimated that the defendant was not estopped by his contract of purchase from J. H. Wilkins, ancestor of plaintiffs, from claiming title as an heir at law of his father, Isaac Suttles, and stated if the jury responded "Yes" to the first issue it would direct them to answer the second "No," but if the answer to the first issue be "No" it would direct them to answer the second "Yes." Plaintiffs excepted.

The plaintiffs thereupon asked to be allowed to take a nonsuit. The defendant claimed the right to have the issues answered by the jury, as he had asked for affirmative relief in his further answer. To this plaintiffs objected. Objection overruled. Plaintiffs excepted.

The Court then instructed the jury that if they believed the evidence they should answer the first issue "Yes" and the second "No." Plaintiffs excepted. The jury responded "Yes" to the first issue and "No" to the second.

From the judgment for the defendant the plaintiff appealed.

Messrs. Forney & Gallert, for plaintiff (appellant).

No counsel *contra.*

MACRAE, J.: "Where a person enters into a tract of land under a written contract to purchase it, he becomes a tenant at will to the bargainor and is estopped from denying his title in an action of ejectment brought against him to recover the possession." *Dowd* v. *Gilchrist,* 1 Jones, 353.

"An estoppel is the conclusive ascertainment of a fact by the parties, so that it no longer can be controverted between them. It is not solely the result of the act of the parties themselves, but may be by the adjudication of a Court appointed to try the facts. After an estoppel has thus arisen if the existence of the fact contrary to it is averred by one of the parties the other may show it by pleading if it be not already apparent upon the record, and pray judgment if it shall be controverted. But if the party seeking the benefit of the estoppel will not rely upon it, but will answer to the fact and again put it in issue, the estoppel, when offered in evidence to the jury, loses its conclusive character, becomes mere evidence and like all other evidence may be repelled by opposite proof, and the jury may, upon the whole evidence, find the truth. This is the rule only in cases where the party relying upon it has had an opportunity of pleading it as an estoppel and does not do so, but takes issue on the fact. Where he has no opportunity of pleading it as an estoppel, as in actions of ejectment and others where the pleadings are general, there the estoppel retains its exclusive character and the jury must find according to it. This is common learning and common sense; by departing from it we are involved in many difficulties and absurdities." *Woodhouse* v. *Williams*, 3 Dev., 508. It will be observed that the pleadings in this case are not general as in the old action of ejectment, or as they may be now in an action for the recovery of the possession of land; but the plaintiff undertakes in his complaint to set out not only that he is the owner and entitled to the possession of the land described, but he goes further and alleges that the defendant entered into possession of the land under contract of purchase with the plaintiff's ancestor and, therefore, as his tenant, and that he has never complied with his contract and paid for the land.

The defendant in his answer sets up as a defence to the action that his (defendant's) father, Isaac Suttles, in 1855 entered under a contract of purchase with the plaintiff's ancestor, now deceased, and that the purchase-money was fully paid in the life-time of his father, and that the defendant and others are heirs of said Isaac Suttles; that after the death of said Isaac Suttles the plaintiff's ancestor fraudulently procured this defendant, in ignorance that his father had already paid for it, to make a new contract to purchase the land.

The plaintiff in his reply admits the contract between Isaac Suttles and plaintiff's ancestor for the purchase of the land, and denies that the defendant or those under whom he claims ever paid for the land or any portion of the purchase-money, and alleges that the same is still due and owing, and denies the allegations of fraud and all other material allegations of the answer. But the plaintiff does not plead that the defendant is estopped to deny that he is the plaintiff's tenant by reason of his occupation of the land under the contract of purchase; he joins issue on the facts alleged by the defendant as his ground for substantive relief and thereby submits to the jury to pass upon the truth of the matter.

Such being the state of the pleadings, his Honor submitted the single question whether Isaac Suttles had paid for the land, upon which the answer to the other two issues depended.

If the estoppel had been pleaded it would have been proper to have submitted the second issue tendered by defendant, for an affirmative response to this issue would have relieved him from the estoppel. In view of the admissions of the parties the issues submitted seem to have covered all their contentions.

Upon the intimations of his Honor the plaintiff asked to be allowed to take a nonsuit, which was denied.

The defendant had set up in his answer a counter-claim for substantive relief. In this class of cases there is the exception to the general rule, as stated in *Bank* v. *Stewart*, 93 N. C., 402, that the plaintiff may submit to a nonsuit at any time before verdict. *Bynum* v. *Powe*, 97 N. C., 374.

No Error.

J. C. COWEN v. T. J. WITHROW et al.

Justice's Judgment—Time of Docketing—Dormant—Sale Under Execution on Dormant Judgment.

1. A judgment of a Justice of the Peace not docketed within a year from the date of its rendition is dormant and its lost vitality cannot be restored by docketing the same in the Superior Court, but only by a new action upon it.
2. A purchaser under an execution on a judgment of a Justice of the Peace docketed after the lapse of a year acquires no title although he be a stranger to the judgment and without notice.

Action for the recovery of land, tried before *Armfield, J.*, and a jury, at Special Term, 1894, of Rutherford Superior Court.

The plaintiff claimed under a Sheriff's deed made in pursuance of a sale under execution on a judgment of a Justice of the Peace rendered on January 17, 1887, and docketed on January 18, 1888. There was a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

Messrs. Forney & Gallert, for defendants (appellants).

No counsel *contra*.

Clark, J.: Judgment was obtained against T. J. Withrow before a Justice of the Peace on January 17, 1887, and docketed in the Superior Court on January 18, 1888. It was then dormant. *The Code*, §840, Rule 14. "Its lost vitality could not be restored by a transfer to the docket of the Superior Court." Smith, C. J., in *Woodard* v. *Paxton*, 101 N. C., 26, and *Williams* v. *Williams*, 85 N. C., 383. If the judgment, either of a Justice of the Peace or of the Superior Court, is docketed while an execution could be issued on it, a purchaser under an execution issued after it becomes dormant, but within ten years, would get a good title if a stranger to the execution, as this plaintiff was. *Murphrey* v. *Wood*, 47 N. C., 63; *Ripley* v. *Arledge*, 94 N. C., 467; *Lyttle* v. *Lyttle*, 94 N. C., 683. The reason is given in the latter case, citing *Tarkinton* v. *Alexander*, 19 N. C., 87, and *Smith* v. *Spencer*, 25 N. C., 256, that the levy operated as a lien and set apart the land, put it in custody of the law, as under the writ of *elegit*. until the debt should be paid. The docketing of a judgment now has the same effect as the levy of an execution upon land formerly. If the judgment becomes dormant the lien still remains for the ten years, and if an execution issues within the ten years although judgment is dormant a purchaser without notice and who is not plaintiff in the execution is not fixed with constructive notice of the irregularity, and gets title by virtue of the lien.

But when a judgment of a Justice of the Peace becomes dormant by the lapse of one year it can only be given efficacy by a new action upon it (*Woodard* v. *Paxton*, *supra*), though if such judgment is docketed while still alive it does not become dormant unless there is a failure to issue execution for three years. *Williams* v. *Williams*, *supra*; *The Code*, §839. The judgment being incapable of enforcement in a Justice's Court without a new action after the lapse of a year, its being docketed in the Superior Court did not give it validity (*Woodard* v. *Paxton*, *supra*) and conferred no lien. The purchaser under it, even a stranger without notice, acquired no title, just as if he had bought after the lapse of ten years without a levy of the execution. *McDonald* v. *Dickson*, 85 N. C., 248; *Lyttle* v. *Lyttle*, *supra*. These matters are not like the failure to keep the execution alive by its issue once at least in every three years (*The Code*, §440), but affect the judgment itself, which has no lien by being docketed, if it is dead when docketed, or when ten years have elapsed since docketing.

Error.

J. W. ALLEN v. MAGGIE BOLEN et al.

Deeds—Registration—Priority—"Connor's Act"—Homestead.

The plaintiff in an action to recover land which, together with two other tracts, had in 1879 been allotted to defendant's father as a homestead, claimed under a Sheriff's deed dated December 22, 1890, and recorded January 21, 1891, the Sheriff having sold under an execution against the defendant's father, to whom, and at whose instance, upon a re-allotment of the homestead, other lands were allotted by commissioners; the defendant claimed under a deed from her father dated January 18, 1883, and recorded March 13, 1891; the plaintiff had no actual or constructive notice at the sale that the defendant was in possession or that she claimed the land; the judgment debtor laid no claim to the land as a part of his homestead: *Held* (1), that, under "Connor's Act" (ch. 147, Acts 1885), providing that no unregistered conveyance of land shall pass any property as against purchasers for value, the plaintiffs deed takes precedence of the defendant's deed; (2), the *locus in quo* was, as to the creditors of the defendant's grantor, simply former homestead land as to which the grantor had waived his homestead in the constitutional way by deed with the prescribed formalities, and was subject to execution for the grantor's debts.

This was an ACTION of ejectment, tried before *Armfield, J.*, and a jury, at Spring Term, 1893, of the Superior Court of RUTHERFORD County.

The plaintiff and defendants both claim under and through A. Mooney. The plaintiff introduced in evidence two judgments, one in favor of A. B. Grayson against A. Mooney and docketed in Superior Court of Rutherford County on July 24, 1890, founded on a debt made in 1890; one judgment in favor of M. W. Craton, founded on a debt contracted in 1884 and docketed May 6, 1889. Also two executions, one issued on the Grayson judgment, dated August 1, 1890, and one issued on the Craton judgment, dated in June, 1890. The allotment of the homestead of A. Mooney, the defendant in these judgments and executions, was then introduced, and it appeared that the homestead was alloted in July, 1890, and this land was not included in the homestead. The advertisement of the land was then introduced, advertising the land for sale by Sheriff on first Monday of September, 1890. The plaintiff introduced a deed from G. W. Long, the Sheriff of Rutherford county, to J. W. Allen, the plaintiff, dated December 22, 1890, and registered on the 21st day of January, 1891, for the land in controversy, and reciting the judgments and executions, laying off of homestead, advertisement and sale of the land on first Monday of September, 1890. The plaintiff then rested and defendant introduced a deed from A. Mooney to his daughter, the defendant D. P. Mooney, for the land in controversy, dated June 18, 1883, and registered March 13, 1891. This deed on its face purports to be in consideration of $400. The defendant D. P. Mooney testified that she is the grantee in the deed, and was born in 1859, and is now thirty-four years old.

She paid no money or property for the land, but the deed was made in consideration of her having lived with her father and her promise to live with him six years longer. She still lives with her father and has always lived with him as a member of the family—he supporting and clothing her.

That her father since the execution of the deed to her as before had collected the rents from the land in controversy and put them in his own crib with his own rents and used them. Her father had rented the land for her and had given it in for taxes in his own name. That she knew that at the time the deed was made to her her father's homestead had been allotted and no property sold for his debts.

James Mode was introduced for defendants and testified that he was one of three commissioners to lay off the homestead of A. Mooney in 1879; that they laid off to him as homestead the "Golden Valley Lands," consisting of the Mitchell tract and the land in controversy, valued at $800, also the Hamby lands valued at $200. The defendants introduced in evidence the return of the laying off of this homestead, signed by the appraisers, all in due form, and showed that it was laid off under an execution issued from the Court against A. Mooney returned and filed with the execution. He was also one of three commissioners appointed to lay off A. Mooney's homestead in 1890 under executions in the Grayson and Craton cases. That they allotted to said A. Mooney in 1890 as his homestead the Mitchell land and a tract known as the Biggerstaff lands, valued at $1,000.

That subsequent to the date that the first homestead was laid off A. Mooney had disposed of the Hamby lands and acquired the Biggerstaff land.

In the allotment of the homestead in 1890 the land in controversy was not included as a part of the homestead, but in 1879 it was. The homestead report of commissioners in 1879 was not registered, but was filed in the Clerk's office with the execution. It appeared that the debts of Grayson and Craton, to satisfy which the land in controversy was sold by the Sheriff to plaintiff, were contracted subsequent to the time the first homestead was assigned. That when the commissioners went to lay off the homestead in 1890 A. Mooney objected, saying it had been laid off, but afterwards asked, if they were going to lay it off, the Biggerstaff land be assigned him in his new homestead. There were no exceptions taken or filed to said allotment of homestead or report, and no appeal from any of the proceedings.

His Honor intimated to plaintiff's counsel that he would charge the jury that the land in controversy was exempt from sale under execution for A. Mooney's debts and therefore the plaintiff could not recover.

Under this intimation the plaintiff submitted to nonsuit and appealed.

Messrs. Justice & Justice, for plaintiff (appellant).
No counsel *contra.*

CLARK, J.: No question affecting the homestead is involved in this case, though that view was strenuously pressed on the argument. The father of the defendant had his homestead, embracing three tracts of land, allotted to him in 1879. The defendant put in evidence that her father executed to her on June 18, 1883, a deed for the *locus in quo*, which is one of said three tracts. This deed was registered March 13, 1891. The father's homestead was re-allotted in 1890, other land being put in place of that conveyed to defendants. The interesting question whether a homesteader can have a second homestead allotted to him when he has conveyed away the whole or part of his allotted homestead is not before us, as there is nothing here calling in question the validity of the homestead of 1890. The homesteader was expressly empowered to convey the homestead land by the Constitution, Art. X, sec. 8, in the manner there provided. Having legally conveyed his homestead in the constitutional mode, the homesteader cannot now claim the *locus in quo* as part of such homestead, nor does he do so. The plaintiff bought at execution sale (September, 1890) under a judgment against the grantor in said deed, which judgment was docketed May 6, 1889. The Sheriff executed a deed to plaintiff December 22, 1890, and it was registered January 21, 1891.

There is no question arising here as to what estate was conveyed by the father to his daughter, if the registration laws were complied with, for the conveyance to the daughter, made in 1883, prior to the lien of the judgment docketed in 1889, carried as to the plaintiff a fee-simple, although the land had previously been allowed as a part of the grantor's homestead. The question is solely between the grantee in the deed and the purchaser under execution against the grantor. The defendant claims under a deed from her father which is registered March 13, 1891. The plaintiff claims under a Sheriff's deed, under an execution against the grantor, which was registered January 21, 1891. The grantor, homesteader, is barred by his deed. He has no interest in the *locus in quo*, and is asserting none. This case comes under the provisions of chapter 147, Acts 1885. Though the deed purports to have been executed prior to the passage of the act it does not come within the proviso thereof, for there was no actual notice at the Sheriff's sale that the defendant was in possession, nor constructive notice, for upon the evidence the grantor, not his daughter, remained in possession after execution of the deed in 1883, receiving all the time the rents and profits and listing the land for taxes in his own name, and at first the grantor seemed disposed to object to the assignment of the homestead of 1890, but afterwards assented. This would indicate, if anything, that he was apparently in possession for himself. There was certainly neither actual nor constructive notice that the defendant was in possession or had any deed. Under the Act of 1885 the plaintiff's prior registered deed takes the property in preference to the junior registered deed, though executed first. This is the rule as between mortgages under *The Code*, §1254, of which the Act of 1885 is a copy *verbatim et literatim*, thus applying to the registration of deeds the same rule applicable to the registration of mortgages. These words having been construed as to the registration of mortgages, when they are copied and used by the Legislature as to the registration of deeds, must bear identically the same meaning. It cannot be said that the plaintiff, who purchased at an execution sale, took the land subject to the rights of the grantee under the unregistered deed. The principle that such a purchaser stands in the place of the judgment debtor is excluded by the statute in so far as it relates to unregistered conveyances, a judgment creditor and a purchaser under execution being within the terms of the act. The grantor is barred by his deed. He cannot claim the land as his homestead, and is not doing so. The defendant cannot avail herself of the unregistered deed to keep off the grantor's creditors. The *locus in quo* was, therefore, as to the creditors, simply former homestead land, as to which the grantor had waived his homestead in the constitutional mode by deed, with prescribed formalities. The grantee not having made her deed available by registration, as the statute requires, the land remained subject to execution for the grantor's debts, and the Sheriff's deed gave the same title to the plaintiff as if the grantor had himself executed a deed instead of the Sheriff, on December 22, 1890, and the plaintiff had registered it on January 21, 1891, as he did the Sheriffs deed, prior to the registration of defendant's deed on March 13, 1891. The plaintiff purchaser at execution sale had no notice that this land had ever been embraced in a homestead, as the allotment of 1879 was not recorded as required by *The Code*, §504. He had no notice by registration or otherwise that the defendant held a deed for it, nor any notice, actual or constructive, that she was in possession. There was no objection made at the sale. The homesteader was in possession of another duly allotted and registered homestead, to which he had filed no exception. He made no claim then nor since to this tract as part of his homestead. In fact, he had solemnly waived all claim to the land by deed. If, under these circumstances, the plaintiff did not get a good title no purchaser at an execution sale would ever be safe. The policy of our law is to encourage bidders at such sales so that property may bring a fair price. Error.

SHEPHERD, C. J., concurring: As the purchaser under the execution sale seems, in the opinion, to be assimilated to a mortgagee under the Act of 1885, I desire to express my disapproval of any inference which may possibly be made to the effect that the said act was intended to abrogate the well-known principle that the rights of such a purchaser or of a judgment creditor shall not prevail over any equities existing against the judgment debtor. This principle occupies too important a place in our jurisprudence to be repealed by implication. The act simply provides that no unregistered conveyances, contracts to convey, or leases for more than three years "shall be valid to pass any property" as against creditors (that is, docketed judgment creditors) and purchasers for value; and it clearly has no application to defences not based alone upon such unregistered conveyances, etc., and which attached to the property while in the hands of the judgment debtor.

P. N. LONG et al. v. W. A. FREEMAN.

Contract—Estoppel by Deed—Receipt of Price.

Where defendant gave to plaintiff and his wife a written agreement to pay them during life, as rent on lands conveyed by the will of the husband, "every year one-sixth part of all the produce raised on said lands, any lands conveyed or which may be conveyed by them, the rents to be paid of such lands," and plaintiffs thereafter conveyed to defendant by deed the land the husband had set apart to defendant by will, and in the deed acknowledged the receipt of the purchase price: *Held*, that, no rights of third persons having intervened, plaintiffs were not estopped to enforce the contract for rents.

CIVIL ACTION, heard before *McIver, J.*, at Fall Term, 1893, of RUTHERFORD Superior Court.

The action was begun before a Justice of the Peace for the recovery of the value of sixteen bushels of corn and three bushels of wheat, due as rent on land conveyed to the defendant by the plaintiff P. N. Long. The summons was issued the 2d day of December, 1891, and at the trial on the 11th day of December, 1891, the plaintiffs recovered judgment for the sum of $11 and costs of the action. From this judgment the defendant appealed to the Superior Court. The defendant admitted that, if plaintiffs were entitled to recover, they were entitled to recover $11. He also admitted that he signed a contract dated January 28, 1879, which contract is as follows:

"We, the undersigned heirs of P. N. Long and Hannah Long, bind ourselves to pay to said P. N. and Hannah Long, as rent on lands conveyed to us in P. N. Long's last will and testament, each the following amount for the purpose of supporting them during their natural life-time, or the life-time of either of them: Every year one-sixth part of all the produce raised on said lands, any lands conveyed or which may be conveyed by them, the rents to be paid of said lands. This January 28, 1879.

"W. L. MELTON,
"M. B. MELTON,
"J. E. MELTON,
"G. W. PANTHER,
"N. B. PANTHER,
"T. W. LONG,
"W. L. LONG,
"H. O. LONG,
"J. A. MELTON,
"L. A. MELTON,
"E. M. FREEMAN,
"W. A. FREEMAN,
"S. B. HARRIS.

"Test: D. L. MELTON.

"Proved before C. M. Hunt, Justice of the Peace, October 16, 1890; probated before R. W. Logan, Clerk Superior Court, October 27, 1890, and registered in office of Register of Deeds of Rutherford county on October 27, 1890."

No objections being raised to the aforesaid contract, the same was introduced as evidence.

Defendant did not deny said contract, and admitted the same. He also admitted being the son-in-law of plaintiffs.

The plaintiff P. N. Long, seventy-five years of age, being sworn, testified that, agreeable to a request of his sons, daughters, sons-in-law and daughters-in-law that he convey his lands to them during his life-time, he drew up a written agreement with them to furnish him and wife with one-sixth of all the produce raised upon said lands, as rent, for the support of himself and his wife; that said agreement was the contract recited above; that W. A. Freeman, the defendant, signed the contract, and he conveyed to him two tracts of land, on one of which the defendant paid him rent as per said contract for four years, and on the other the defendant paid rent as per said contract for three years; that he told defendant if he paid him $160 he would not charge him rent: that defendant did not pay him said sum, and owed him rent as per said contract since 1891.

The defendant introduced two deeds, one from P. N. Long and Hannah Long to F. M. Freeman, and the other from P. N. Long to W. N. Freeman, both dated in 1886, and duly registered. He admitted the contract recited, but claimed that the deeds estopped plaintiffs from claiming rents from defendant, and that the deeds annulled contract for rent. He also claimed that the aforesaid contract could not apply to lands subsequently conveyed without expressly reserving rents as per said contract.

The plaintiffs claimed that said contract had express reference to any subsequent conveyances between the parties, as well as those conveyances made at the time of drawing up said conveyances or previous thereto.

The Court held with the plaintiffs and construed the said contract as binding upon the defendant for the payment of rents, as the said contract premeditated future conveyances and expressly referred to such conveyances. To this ruling of the Court the defendant excepted and appealed.

Messrs. Forney & Gallert, for plaintiffs.
Messrs. McBrayer & Durham, for defendant (appellant).

MACRAE, J.: In 1879 the defendant and others agreed with plaintiffs to pay them one-sixth part of all the produce raised upon the lands "conveyed" by plaintiffs to said defendant and others in P. N. Long's last will and testament. The agreement proceeds further: "Any lands conveyed or which may be conveyed by them (the plaintiffs), the rents to be paid of said lands." Though very inartificially drawn there is no difficulty in reaching the true construction of this instrument—that, if the plaintiffs' lands should be conveyed by deed to the parties thereto during the life of P. N. Long and wife, instead of being devised to them by will, the grantees should continue to pay to the grantors one-sixth of the produce raised thereon as rents.

We are of the opinion that there is no estoppel upon plaintiffs to claim the said one-sixth by reason of the acknowledgment of receipt of the purchase price named in the deed. If the provision for its payment had been expressed in the deed it would have been good. This agreement, however, was made long before the execution of the deed, and with express reference to that contingency, as if to avoid the contrary presumption which would have arisen upon the deed but for this provision. No rights have accrued to purchasers. The controversy is entirely between the parties to the original contract. There is nothing to hinder them from recovering upon the contract to pay rent in case there should be a conveyance. *Lane* v. *Wingate*, 3 Ired., 327. The plaintiffs do not dispute their own solemn deed, but allege another and independent contract. *Sherrill* v. *Hagan*, 92 N. C., 345.

No Error.

*W. W. OVERMAN v. M. C. TATE et al.

Partition—Contingent Remainder—Persons not In Esse—Trustee.

1. Where there are contingent interests to be affected by the proceeding for the sale of land for partition it will be decreed if there is some one before the Court to represent such interest, it being a general principal that every one has a right to enjoy his own in severalty.
2. The interest in land of one co-tenant was conveyed to T. and his heirs in trust for the sole and separate use of T.'s wife for life "and at her death to such child or children and the representatives of such as she shall have living by the said T., and their heirs forever," and in default of such child or representative of such living at the death of the wife, then to T. and his heirs; T. died leaving him surviving his wife and two children by her, as well as children and grandchildren by a former marriage: *Held*, in a suit for a sale for partition to which all of the persons named, together with the trustees, are parties and ask for the sale, the co-tenant is entitled to have the land sold for partition.

This was a RULE upon S. Wittkowsky, purchaser of the land described in the petition for partition, to compel him to comply with the terms of the sale, heard first before the Clerk of Mecklenburg Superior Court and then by appeal before *Boykin, J.*, holding the Courts of the Eleventh District, at Chambers.

The respondent, S. Wittkowsky, filed an answer to the rule, alleging that the title to the land was defective and setting forth the facts upon which he based his claim or allegation. The plaintiff demurred to this answer and the Clerk sustained the demurrer, and independently of it held the answer to be insufficient and made the rule absolute. This ruling was affirmed by the Judge on the appeal and then the said respondent, Wittkowsky, excepted and appealed to the Supreme Court.

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*BURWELL, J., having been of counsel, did not sit on the hearing of this case.

The pertinent facts are stated in the opinion of Chief Justice Shepherd.

Messrs. Walker & Cansler, for plaintiff.

Mr. Geo. F. Bason, for defendant Wittkowsky (appellant).

Shepherd, C. J.: The petitioner, W. W. Overman, is the absolute owner in fee of a two-fifths interest in the land described in the petition, and in 1869 Charles Overman was the absolute owner of the remaining three-fifths interest therein. The interest of Charles Overman was sold under execution and purchased by Thomas R. Tate, who caused the Sheriff to execute to him a deed containing the following limitation: "To have and to hold to him the said T. R. Tate, his heirs, executors, administrators and assigns, for the following purposes, to-wit, to the sole and separate use of Mary Cornelia Tate, wife of said Thomas R. Tate, for her life, and at her death to such child or children and the representatives of such as she shall have living by the said T. R. Tate, and their heirs forever. Should the said Mary Tate die without a child or representative of such living at her death, then to the said Thomas R. Tate and his heirs forever." Thomas R. Tate died some years ago, leaving him surviving his widow, Mary Tate, and two children, Annie Tate and J. Caswell Tate, and several children and grandchildren by a former marriage.

This proceeding was brought by the petitioner for the purpose of having the land sold for partition, and all of the above-named persons who are interested, together with an infant child of Annie Tate and the heirs at law of Thomas R. Tate (who succeeded him in the trust), are joined as parties defendant.

The land not being susceptible of an actual division, it was decreed that it should be sold, and at the sale S. Wittkowsky became the highest bidder in the sum of $15,110. The purchaser refuses to comply with the terms of the sale on the ground that he has been advised that by reason of the contingent limitations in the deed above named to persons not *in esse* he will not acquire a good and indefeasible title. Under the decisions in the case of *Aydlett* v. *Pendleton*, 111 N. C., 28, and the cases cited in the opinion, the objection would seem to be well taken, and so in the case of *Overman* v. *Sims*, 96 N. C., 451, where this partiular limitation was considered by the Court, it was held that a title could not be made so as to bind such contingent interests. The Court said: "But the contingency would remain, that the issue of Caswell and Annie would become entitled, if such there were, upon the death of the life tenant, if Caswell and Annie were not then living to take."

There are several cases in our Reports and many to be found cited in the text-books in which a sale has been denied although the Court could readily see that the ends of justice as well as the interests of the parties would be promoted by decreeing otherwise. The difficulty in such instances consists in the fact that there is no one before the Court who represents the contingent interests, and as these are not concluded an indefeasible title cannot be made to the purchaser. Where, however, this objection can be avoided, the Courts are not slow in proper cases to give effect to the general principle that every one has a right to enjoy his own in severalty, and this is well sustained by a public policy which discourages everything like the tying up of property and the prevention of its alienation. In accordance with this policy it was laid down by Lord HARDWICKE in the leading case of *Hopkins* v. *Hopkins*, 1 Atk., 590, that, "If there are ever so many contingent limitations of a trust it is an established rule that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." This principle has also been applied in some jurisdictions where the first remainder in trust was for life and such remainderman and the trustee were parties and united in the prayer for relief. We are not prepared to adopt this latter view, but we think that under the circumstances of this case the contingent interests are sufficiently represented.

It is true that the interests of Annie and Caswell Tate cannot be said to be vested estates of inheritance, so as to comply strictly with the rule laid down by Lord HARDWICKE, but they are remainders in fee subject to be defeated only by their death without issue before the death of their mother, in which event it is to vest in the heirs at law of Thomas R. Tate. All of these parties, together with the infant child of Annie, who is the representative of a class who take simply as representatives of their parents, are before the Court. Under these peculiar circumstances, the legal title being in the trustees (*King* v. *Rhew*, 108 N. C., 616), we think that the contingent interests are of such a character as to be represented by them.

The attention of the Court in *Overman* v. *Syms*, *supra*, does not seem to have been directed to the fact that the limitations were in trust; nor was the child of Annie (now Mrs. Weaver) born at that time. These considerations render it unnecessary to review the previous decisions of this Court. It must not be understood that this ruling modifies the principle that, as a general rule, the *cestui que trustent* must be joined as parties in all matters concerning the trust property.

As all of the parties united in asking that the property be sold we must affirm the order of the Court below. The proceeds of the sale should be so invested as to conform to the limitations of the trust. Affirmed.

G. A. DAVIDSON v. J. A. POWELL et al.

Indorsement of Note—Surety—Burden of Proof.

1. Where the payee (whether original or by a previous indorsement) of a note assigns or transfers it by indorsement he becomes simply an indorser and, by section 50 of *The Code*, liable as a surety unless by the terms of the assignment he limits his liability; if he intends to transfer the title only he should use the words "without recourse" or other phrase of similar import.
2. An indorsement, "I assign over the within note to P.," does not limit the indorser's liability as such.
3. While, if the note be in the hands of the original payee, an indorsement may be shown to have been upon certain conditions, yet a *bona fide* holder for value, before maturity and without notice, is not affected by any equities existing between the original parties, and the same rule applies between the last payee and all subsequent indorsers.
4. The burden of proof is upon an indorser to show any agreement by which his liability was restricted.

CIVIL ACTION, heard before *Armfield, J.*, and a jury, at Special Term, 1894, of RUTHERFORD Superior Court.

The action was commenced in a Justice's Court for the recovery of the sum of $138.90, claimed by plaintiff against defendants as indorsers on two several promissory notes under seal. Said notes were executed by J. W. Davis to John A. Powell, and on the back of each are the following words, to-wit:

"I assign over the within note to S. M. Powell. May 18, 1892. (Signed) JOHN A. POWELL."

"For value received I assign over the within note to G. A. Davidson, this December 6, 1892.
"(Signed) S. M. POWELL."

The Justice of the Peace rendered judgment against the defendants, from which they appealed.

The returns of the Justice to the notice of appeal show the following pleadings or answer made by defendants in his Court:

"The defendants deny the right of plaintiff to recovery, on the grounds that they are not liable on said notes as principals, sureties or indorsers; that the transfer of said notes to plaintiff was with the understanding that they were not to become liable for the same.

"For a further defence the defendants allege that the mortgage deed securing said notes did not authorize the sale of said lands therein described, as the same was made, and that the property embraced in said mortgage deed was more than sufficient to pay the notes, and would have done so if sold under a decree of foreclosure."

On the trial in the Superior Court the plaintiff introduced the notes and rested his case—the assignment being admitted by defendants. On motion of plaintiff, "the further defence," relating to mortgage deed made by Davis to secure said notes, and the alleged irregularity of sale, was stricken out as being "too vague and indefinite."

Defendants excepted.

Defendants then asked the Court to instruct the jury that the language of the transfer only passed the title and property in the notes to plaintiff, and he could not recover. Request refused and defendants excepted.

Defendants then asked the Court to instruct the jury that the burden was upon plaintiff to show to the satisfaction of the jury that the defendants agreed and contracted not only to pass the title and property in the notes, but to make themselves liable as indorsers. The Court refused to give the instructions, but stated that the burden was upon defendants to show that the contract and understanding between the parties at the time was that defendants were not to become liable as indorsers.

One of the notes was past due at the time John A. Powell transferred to S. M. Powell. Both notes were past due when S. M. Powell transferred to plaintiff.

Defendant S. M. Powell was introduced as a witness and said that when John Powell sold him the notes he did not transfer them, but witness, after that time, asked John to assign them so he, witness, could trade them. When John assigned the notes he told witness he must not go back on him. Witness said nothing.

The witness further testified that he sold the notes to plaintiff for land, and told him he would give him $5.25 per acre for the land if he would take the notes. He wanted witness to shave the notes, but witness would not. Plaintiff had a deed to land drawn and witness turned over the notes; did not indorse them for a month afterwards. The witness said B. McMahan asked him to transfer the notes, or plaintiff could not sell the land under the mortgage or collect the notes from Davis. Witness assigned them to enable plaintiff to collect from Davis. Nothing said at the time of transfer about witness becoming liable on the notes by his indorsement.

J. W. Davis testified that he made the notes to John A. Powell; that plaintiff came to see him and said he wanted to buy a horse.

The plaintiff then testified that S. M. Powell told him he would assign over the notes, and it was forgotten at time of trade; Powell took the notes to McMahan's and assigned them.

B. McMahan, for plaintiff, testified that he wrote the indorsement on the notes, but did not tell Powell plaintiff could not collect without indorsement, but said to Powell that it was usual to transfer, or the usual form.

The following issue was submitted to the jury and answered, Yes:

"Was it the understanding of the parties at and before the trade that the notes would be indorsed by S. M. Powell to plaintiff?"

Judgment for plaintiff. Defendants appealed.

Messrs. McBrayer & Durham, for defendants (appellants).

No counsel *contra*.

MACRAE, J.: The indorsement of a note, as generally understood, is its transfer or assignment by writing upon its back, although a negotiable note may be transferred without indorsement. If indorsed it may be, and generally is, in blank, it having long been the practice for the counsel to fill up the bank on the trial, if an action is brought upon it. The blank may be filled by the holder in any way which will not enlarge the liability of the indorser. The usual words by which the indorser may limit his liability are "without recourse"; and by these or similar words it is at once understood that the indorser is not to be held liable unless it turns out that the note is not a valid obligation of those whose names are upon it.

The exact and legal meaning of the word "indorsement," as applied to notes and bills, is "the transfer of a negotiable note or bill by the indorsement of some person who has the right to indorse. Nor can there be an indorsement, in this sense of the word, except by the payee of the bill; but he may be the original payee, or he may have become, by previous indorsement, a second or subsequent payee." 2 Pars. Bills & N., 1. To assign is to transfer to another. Abbott's Law Dictionary. A bill or note may be assigned by delivery, and without indorsement, in which case his liability is somewhat different from that of an indorser. 1 Daniel Neg. Inst., section 730. When assigned or transferred by indorsement he becomes simply an indorser unless, by the terms of the assignment, his liability is limited. When, as in this case, he uses the words, "I assign over the within note to S. M. Powell," and S. M. Powell indorses, "For value received I assign over the within note to G. A. Davidson," there is no restriction upon their liability.

The effect of indorsements, where expressions like those used in our case are employed by the indorser, is discussed in 1 Daniel, *supra* (section 688*c*), where he states his conclusion thus: "It is from the fact that a payee assigns a bill or negotiable note by indorsement of his name on the back of it that the law implies his liability as an indorser. His relation to the instrument creates the implication, and the circumstance that he sets forth that relation in express terms does not change it, for the maxim applies, '*Expressio eorum quae tacite insunt nihil operatur.*' Did the payee intend merely to pass the title he should use the words 'without recourse,' or some phrase of equal import."

By section 50 of *The Code*, "Whenever any bill or negotiable bond or promissory note shall be indorsed, such indorsement, unless it be otherwise plainly expressed therein, shall render the indorser liable as surety to any holder of such bill, bond or promissory note." In the hands of the original payee an indorsement may be shown to be upon certain conditions; but a *bona fide* holder for value before maturity and without notice is not affected by any equities existing between the original parties. The same rule will apply between the last payee and all subsequent indorsers.

It appears that the note in question was assigned by indorsement of the original payee to S. M. Powell before maturity and by him to plaintiff after maturity. His Honor, therefore, presented an issue to the jury, "Was it the understanding of the parties at and before the trade that the notes would be indorsed by S. M. Powell to plaintiff?" which was answered in the affirmative.

It follows from what we have said that there was no error in the refusal of his Honor to give the instructions asked by defendants. The effect of the indorsements was to make the indorsers liable under the statute; and if there was a different agreement between the parties by which the plaintiff was bound the burden was upon the defendants to show it.

We concur in the view taken by his Honor that the "further defence" was too vague and indefinite to be considered. There is no error. Affirmed.

G. W. CANNON AND WIFE AND W. H. WESTALL v. C. J. McCAPE AND E. H. HENDRICKSON.

Trustee—Power of Sale—Commissions and Expenses.

Where a deed of trust to secure a debt empowers the trustee to advertise and sell the property in case of default in the payment of the debt and directs him to apply the proceeds of sale to the discharge of the debt and to the payment of "expenses" of the trust, including "five per cent. commissions" to the trustee, the latter, after default in the payment of the debt and advertisement of the sale, is entitled to his commissions and reasonable counsel fees paid by him in the execution of the trust, notwithstanding the tender, by one having a second lien, of the amount of the debt secured by the deed and though the sale, by reason of a restraining order, is not made.

CLARK, J., dissents, *arguendo*.

CIVIL ACTION for an accounting as to the amount due the defendant Hendrickson under a deed of trust executed by Cannon and wife to the defendant McCape, and for an injunction restraining the trustee from selling the property conveyed by the deed of trust.

A restraining order was issued by Judge Shuford on the 12th January, 1894, at Asheville, returnable before his Honor J. D. McIver (Judge riding the Twelfth District) at Chambers in Carthage, N. C., on the 5th February, 1894. Judgment was rendered dissolving the restraining order and against plaintiffs for costs, and plaintiffs appealed.

The facts are stated in the opinion of Associate Justice MACRAE.

Mr. Charles A. Moore, for plaintiffs (appellants).

Mr. W. W. Jones, for defendants.

MACRAE, J.: It was alleged in the plaintiffs' complaint that the amount paid into court and accepted by the defendant Mrs. Hendrickson was by mutual mistake a greater sum than was really due, but the affidavit of plaintiff Cannon states that the amount so tendered "is the total amount, principal, interest and costs, including taxes, insurance and all other proper and legitimate charges against the affiant because of said note and deed of trust." On the part of the defendants it is alleged that the trustee is entitled to his commissions, five per cent., and to thirty dollars, a fee paid to an attorney whom he found it necessary to consult in the management of his trust.

On the argument it was admitted that the only question for this Court was whether the trustee is entitled to commissions, the sale never having been made by him under the provisions of the deed of trust, and to the amount paid to his attorney. That in this State trustees are entitled to reasonable compensation, even though there is no express provision to that effect in the deed, is so long settled that it will hardly be necessary to cite authorities. We refer, however, to the leading case on the subject, which renders it entirely useless to seek support in the utterances of other Courts than our own, for this and the other principle that when this compensation is fixed by the parties "it will be subject to the revision of the Court and will be reduced to what is fair, or altogether denied if the stipulation for it has been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been *mala fide* and injurious to the *cestui que trust.*" *Boyd* v. *Hawkins*, 2 Dev. Eq., 329.

It is explained in the opinion of Chief Justice RUFFIN in the above cited case that in England the rule was different, because trustees, who were *quasi* officers of the law, as executors, etc., seldom act personally, or are more than nominal owners of the legal title, the business of the trust being conducted by solicitors and law agents, by whom the compensation is derived. In this State, as early as 1799, an act was passed providing compensation for executors, guardians and the like, and the courts of equity, following the law, extended this provision to conventional trustees, allowing them compensation or commissions in analogy to the allowance to public or *quasi* public officers by virtue of the statute. *Sherrill* v. *Shuford*, 6 Ired. Eq., 228; *Ingram* v. *Kirkpatrick*, 8 Ired. Eq., 62. In the case before us a commission of five per cent. is allowed the trustee by the deed. It is not clearly stated upon what sum this per cent.

is to be paid, but a fair interpretation can give it no other meaning than upon the amount realized from the sale by him. After providing for the sale and conveyance of title to the purchaser the language of the instrument is as follows: "And apply the proceeds of said land to the discharge of said debt and interest on the same, and to the payment of the *expenses* of this trust, including *five per cent. commissions* to the trustee," etc. This we hold constitutes an express charge upon the land conveyed as security for the debt, in favor of the expenses and commissions also. Reasonable counsel fees have always been allowed to trustees when the advice of counsel appears, as in this case, to have been necessary to enable him properly to execute his trust. These expenses and commissions being secured by the terms of the deed, it was the duty of the trustee, upon default of the trustor, to advertise and sell the land, collect the purchase-money, make title to the purchasers, satisfy the debt, expenses and commissions, and pay the balance to the trustor. This duty was not unlike that of a Sheriff when an execution has been placed in his hands; it is beyond controversy that in such case when the Sheriff levies and advertises for sale, but in consequence of the payment of the debt to the plaintiff by the defendant in execution does not actually sell, he is nevertheless entitled to his commissions on the whole debt under the Act of 1784. *Matlock* v. *Gray*, 4 Hawks, 1. And where an injunction was granted to restrain the collection of a part of an execution, upon condition that the plaintiff would pay into office that part which was admitted to be due, it was held that the Sheriff was entitled to his commissions upon the sum paid in. *Dibbell* v. *Aycock*, 5 Jones' Eq., 399.

The trustee having advertised the land for sale upon default, the plaintiff Westall, being a judgment creditor of the other plaintiff, G. W. Cannon, tendered the amount admitted to be due upon the trust debt, and, as we understand the controversy, the trustee refused to receive it in full satisfaction, claiming in addition thereto $125 for his commissions on sale and the amount paid by him as a fee for counsel. It will be seen by a calculation that the sum named is very little more than the commissions upon the amount paid in. His Honor Judge Shuford granted the restraining order upon the payment into court of the sum tendered and the giving of a bond in the sum of $200 to cover any damage by reason of the restraining order. When the order to show cause was returned before his Honor Judge McIver, it appearing to him that the only matter in dispute was the question of commissions, in which was included the counsel fees, he dissolved the restraining order.

Pursuing the analogy in the rulings of the Court between the rights of public officers, as Sheriffs, and those of trustees for sale under a deed to secure debts, we concur in the view taken by his Honor. If there were a controversy involving the necessity of an account to ascertain the amount due, it would be proper to continue the restraining order until such accounts could be taken, but this is entirely unnecessary, as the defendant trustee claims $125 to cover both commissions and attorney's fees.

Judgment Affirmed.

CLARK, J., dissenting: I concur with the Court that the fair and reasonable construction is that the commission is to be allowed on the sum "realized by the sale," though not on any amount beyond the debt. But here there was no sale, and hence no sum on which commission could be allowed. When property was levied on and advertised for sale under execution, but payment was made before sale, the Sheriff was allowed no commission on the sale. *Daw-*

son v. *Grafflin*, 84 N. C., 100. It took a statute to change this. *The Code*, §3752. But there has been no statute as yet extending this rule to trustees or mortgagees when the debtor pays before sale. It is to be feared that such practice, if adopted, will result in oppression in very many instances.

J. J. & J. E. MADDOX v. A. J. ARP et al.

Deed—Registration—Notice—Priority—"Connor's Act."

Under "Connor's Act" (ch. 147, Acts of 1885), which provides that no conveyance of land or contract to convey shall be valid as against purchasers for value but from the registration thereof, actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered.

This was a CIVIL ACTION, tried before *Graves, J.*, and a jury, at July Special Term, 1893, of CHEROKEE Superior Court, upon the pleadings, issues, exhibits and other evidence offered on the trial, as follows:

The plaintiffs offered and read in evidence note and mortgage deed for two town lots, Nos. 7 and 8, described in complaint, made to J. J. & J. E. Maddox by A. J. Arp and wife, dated 23d August, 1890, and registered on same day; also a deed from E. M. Kilpatrick and wife to H. C. Culberson and M. R. Hyatt on 26th January, 1891, for lot No. 7, which deed was registered 28th day of January, 1891; also deed from H. C. Culberson to M. R. Hyatt for his interest in lot No. 7, dated August 8, 1891, registered October 9, 1891; also deed from M. R. Hyatt to Daniel Briscoe, P. J. Briscoe, S. C. Reney and R. R. Swepson for said lot No. 7, dated August 8, 1891, registered October 9, 1891; also bond for title for said lot of land from E. M. Kilpatrick to A. J. Arp, dated 23d May, 1888, and the assignment thereon to Culberson and Hyatt, dated 23d January, 1891, which bond was registered 22d May, 1892.

Plaintiffs withdrew allegations of fraud and disclaimed the ten per cent. attorney's fees.

There was parol evidence on part of plaintiffs tending strongly to show that defendants had actual notice of plaintiffs' mortgage before they purchased.

The defendants offered and read in evidence deed from M. R. Hyatt to Daniel Briscoe, P. J. Briscoe, S. C. Reney and R. R. Swepson for lot No. 7, dated August 8, 1891, registered October 9, 1891.

Defendants Briscoes, Reney and Swepson offered evidence tending to prove that they did not have any notice of plaintiffs' mortgage nor of the bond for title, and that they paid the sum of $425 for lot No. 7, which was full value for same.

It was further in evidence that Arp did not pay any of the purchase-money for said lot, but that Culberson and Hyatt paid Kilpatrick for same, which was $25, with interest.

It was in evidence that Briscoes, Reney and Swepson resided in Knoxville, Tennessee.

The counsel for the defendants Briscoes, Reney and Swepson argued to the jury and to the Court and insisted that the defendants Briscoes, Reney and Swepson were innocent purchasers for value without notice of plaintiffs' claim; that the registration of the mortgage from Arp and wife to plaintiffs was not notice to these defendants unless they had actual notice of the same or of the said bond of Kilpatrick to Arp, there being no title in Arp or registration of the same for said lot of land; that if the said bond had ever been held by said Arp and assigned by him to Culberson and Hyatt, the same not having been put to registration, the same would not be notice to Briscoes, Reney and Swepson for want of record title in Arp; that the registration of said mortgage to plaintiffs would not be such notice to said defendants as would prevent them from taking the land as innocent purchasers unless they were fixed with actual notice of the bond and mortgage at the time of their said purchase, there being no title in the said Arp.

The Court charged the jury that if the defendant Arp executed a mortgage to plaintiffs and that mortgage was duly registered, then the public registration became notice to all persons, whether they be residents of this State or of another State, so if Briscoes, Reney and Swepson became purchasers after the registration of the mortgage they took with notice of plaintiffs' claim; if Kilpatrick had executed a bond for title whereby he agreed to make title to Arp, Arp thereby acquired an equitable right to have the land described in the bond conveyed to him on the payment of the purchase-money, and such right may be conveyed to another, and if Arp did make the mortgage to plaintiffs they became entitled to all the equitable right Arp had, and if after the mortgage to plaintiffs Arp conveyed this equitable right to another, that would not convey the equitable right from the plaintiffs, and if such other got the legal title from Kilpatrick he held it subject to the equity of the plaintiffs; and if he conveyed it to Culberson and Hyatt they took it subject to the equitable right of plaintiffs, and if the legal title was conveyed to Briscoes, Reny and Swepson, if they took it with notice, they held the legal title subject to the rights of the plaintiffs to have the land conveyed to them upon their payment of the purchase-money and interest to Briscoe & Co.

The defendants Briscoes, Reney and Swepson excepted to the errors in ~~the~~ charge of the Court.

The jury found all issues in favor of plaintiffs.

Motion by defendants Briscoes, Reney and Swepson for new trial of the action for the errors committed by the Court in his instructions to the jury, as set out in the case on appeal; motion denied; judgment by the Court accordingly, and said defendants appealed.

Mr. E. B. Norvell, for plaintiffs.

Messrs. J. W. & R. L. Cooper, for defendants (appellants).

SHEPHERD, C. J.: It is provided by ch. 147, Acts 1885, that "No conveyance of land nor contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the registration thereof within the county where the land lieth." The present case not being within the proviso of the act, actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered according to law. The allegations of fraud having been withdrawn, the only question to be determined is whether there was anything on the books of registration which could affect the defendants Briscoes, Reney and Swepson with notice of the claim of the plaintiffs. The plaintiffs took a mortgage from Arp and Arp had nothing but an unregistered contract to convey from Kilpatrick. The said defendants purchased from Hyatt, who had a clear registered chain of title from Kilpatrick, and all that they had to do was to follow "up the stream of title" as it appeared of record; and if it was unbroken and they found no registration of a contract of sale from any of the holders of the legal title they could not be compelled to look over the whole records for the mortgage from Arp to the plaintiffs, when the records would not have disclosed any connection of Arp with the line of title.

There is error. Reversed.

N. H. RICE v. W. H. GUTHRIE.

Record on Appeal—Dismissal.

1. Where a motion was made to set aside a decree of sale and, adversely, a motion to confirm the report of sale and for final judgment was made, the latter was allowed and the former continued, but no appeal was taken from the final decree, the Judge at the next term properly held it to be unnecessary to consider the motion to set aside the former decree.
2. Where the record in this Court consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a *certiorari*, nor that the case be remanded, the appeal will be dismissed.

MOTION in the cause to set aside judgment, etc., in MADISON Superior Court, heard before *Armfield, J.*, at Chambers in Asheville, August 16, 1892.

The facts appear in the opinion of Associate Justice CLARK.

Mr. J. M. Gudger, for defendant.

No counsel *contra.*

CLARK, J.: In this cause an interlocutory order of sale was made at Fall Term, 1891. At Fall Term, 1892, the report of sale came in. A motion to set aside the decree of sale was made and a motion to confirm the report and for final judgment. The Court confirmed the report and rendered final judgment, but continued the motion to set aside the former decree. This was anomalous. But as there was no appeal from the final decree it was properly held by the Judge at the next term that it would be a vain thing to consider the motion to set aside the first judgment. We say this much, treating the statement of the case as a record, but in fact there is no record proper before us. There is nothing before us except the case on appeal. There is neither summons nor pleadings. Though a defective transcript, especially when there is no laches, will be helped out by a *certiorari*, or the case may be remanded (Clark's Code, 2d Ed., p. 575), yet in a case like this, where the case on appeal was the sole transcript, the appeal was dismissed. *Sneeden* v. *Harris*, 107 N. C., 311. Besides, in the present case no excuse is offered for the defective record, nor application for *certiorari*, nor that the case be remanded.

Appeal Dismissed.

WILLIAM MONROE v. S. D. TRENHOLM.

Trust Deed—Trustee—Cestui Que Trust—Power of Alienation.

(For syllabus see same case reported in 112 N. C., p. 634).

PETITION of plaintiff to rehear the case decided at Spring Term, 1893, and reported in 112 N. C., at page 634.

Messrs. F. A. Sondley and *W. W. Jones*, for petitioner.
Messrs. Busbee & Busbee, contra.

PER CURIAM: We have given to the argument of the counsel for the petitioner the careful consideration which its ability and learning so richly merit. We are of the opinion that he has established the proposition that, where property is limited in trust for a married woman for the sole purpose of preserving it from the marital rights and influence of the husband, the restrictions upon alienation become inoperative when the coverture ceases, but in view of the peculiar phraseology of this deed our conclusion is that the principle mentioned does not apply to this case.

Petition Dismissed.

DURHAM FERTILIZER COMPANY v. W. P. BLACK et al.

Practice—Case on Appeal—Dismissal—Error in Record—Judgment by Default at Return Term—Answer of One of Several Defendants.

1. Where there is no case on appeal the judgment will be affirmed unless error appear on the face of the record.
2. Where the record showed a complaint stating a cause of action against all of the defendants, an answer purporting to be the answer of all the defendants and setting up a common defence, and a judgment at the return term reciting service of summons on the defendants and rendered against two of the defendants for failure to answer: *Held*, there was error on the face of the record.

APPEAL from a judgment rendered by *Armfield, J.*, in favor of the plaintiff against the defendants Eller and Roberts, in default of answer, at December Term, 1893, of BUNCOMBE Superior Court.

The action was upon a promissory note signed by all of the defendants, and was brought to December Term, 1893, summons having been served on all the defendants. The defendant Black filed an answer purporting to be the answer of all the defendants, and the case was continued as to him. The defendants Eller and Roberts appealed. No case on appeal accompanied the record.

Mr. James H. Merrimon, for plaintiff.
Mr. W. W. Jones, for defendants (appellants).

MACRAE, J.: The plaintiff in this Court moves to affirm the judgment below because there is no "case" on appeal and no assignment of error, and it is entitled to this judgment if no errors appear on the face of the record. Clark's Code, p. 582, where many cases are cited.

On examination of the record we find a complaint duly verified and entitled of December Term, 1893, stating a cause of action against all of the defendants; a judgment final against defendants Eller and Roberts; an answer purporting to be the answer of *the defendants*, which answer sets up a valid defence, if proven, for all of the defendants, to-wit, a total failure of consideration for the note sued upon, and further, a "second defence by way of counter-claim," in which the defendant Black alleges damage to him by reason of a false warranty by plaintiff. There is also upon the record a notice of appeal by defendants Eller and Roberts in due form, indorsed "service accepted" by plaintiff's attorney. The record also contains copies of entries upon the minute docket: "Thirty days to file answer as to W. E. Weaver. Judgment stricken out as to Black." And entries upon the judgment docket of the judgment against Eller and Roberts and appeal by them. All of the entries appear to have been made at said December Term, 1893, of Buncombe Superior Court.

A judgment of the Court is presumed to be correct. Error must be shown or the judgment will be affirmed. But "in every case the Court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." *The Code*, §957. The record shows an answer purporting to be the answer of *the defendants* and duly verified by one of them and entitled of the return term—the same term at which judgment was rendered. By section 207 of *The Code* the defendant has a right to answer at said return term of the summons.

The whole record is presumed to be true; here is a judgment reciting due service on these defendants and a failure to answer by the appellants, and here is an answer purporting to be that of the defendants, which means all of them, at the same term.

In the absence of any statement of the case upon the face of the record the judgment appears to be irregular. It may be that his Honor held that this answer was not the answer of the defendants against whom he rendered judgment. Upon its face it appears to be the answer of all, it is signed by an attorney and is verified by one of the defendants. It seems to be in accordance with law. Upon the face of the record the judgment was not warranted by law and must therefore be reversed. Reversed.

G. ROSENTHAL, Trustee, v. J. D. ROBERSON, Administrator of W. A. Fanning.

Case on Appeal—Time for Service—Practice—Dismissal of Appeal—Nonsuit—Error in Name of Party—Judgment, how corrected—Motion in the Cause.

1. The time within which a case and counter-case on appeal must be served being prescribed by statute, the Courts cannot prescribe a different method by extending the time, but this can only be done by consent of the parties if admitted or reduced to writing or entered on the minutes or docket.
2. The time for service of a case on appeal must be computed from the day of the actual adjournment of the Court, and not from the last day to which a term of Court could be extended.
3. Service of a case on appeal after the expiration of the time allowed for the same is a nullity.
4. Although the absence of a case on appeal is not ground for a motion to dismiss, the judgment will be affirmed unless errors appear on the face of record proper.
5. Where the appellant is a plaintiff who has submitted to a nonsuit, there can be no error in the record proper which could avail him.
6. Where no judgment was entered below an appeal from a judgment of nonsuit, will be dismisssd.
7. Where the summons in an action was served upon W. A. F., who was named in the summons, the fact that a judgment was rendered against "W. H. F." does not necessarily vitiate it or render it void; but it may be corrected by motion in the cause, and is expressly allowed at any time by section 273 of *The Code*, and need not be made within a year after notice thereof.
8. An action brought in one county to correct a judgment rendered in another cannot be treated as a motion in the cause.

CIVIL ACTION, brought in the Superior Court of HENDERSON County to correct a judgment rendered in Transylvania Superior Court. The original action was begun in Transylvania by the issuing of a summons against W. A. Fanning and others, which was served upon W. A. Fanning, and at Spring Term, 1890, of said Court judgment was rendered against "W. H. Fanning." W. A. Fanning, being a resident of Henderson county, died and the defendant Roberson was appointed his administrator, against whom this action was instituted at Spring Term, 1893, of Henderson Superior Court.

The defendant, after denying in his answer that his intestate's estate was in anywise liable to plaintiff, for a further defence said that he had no notice whatever of any alleged judgment against his intestate in favor of plaintiff until the bringing of this action, and denied that there was any judgment or other liability in favor of the plaintiff against the defendant or his intestate's estate.

Upon the trial before *McIver, J.*, and a jury, at Fall Term, 1893, of Henderson Superior Court, his Honor, after hearing the complaint and answer, intimated that the plaintiff could not recover, and in deference to this opinion the plaintiff took a nonsuit and appealed.

Messrs. Busbee & Busbee, for plaintiff (appellant).
Messrs. W. A. Smith and *T. J. Rickman*, for defendant.

CLARK, J.: The record states: "Plaintiff allowed twenty days to prepare case on appeal, and defendant twenty days thereafter to accept plaintiff's statement of case on appeal or prepare his statement." The time within which a case and counter-case on appeal must be served is prescribed and limited by statute. Acts 1889, ch. 161, amending *The Code*, §550. The Courts have no power to disregard the statute and prescribe a different period by extending the time. *State* v. *Price*, 110 N. C., 599. The parties, however, can consent to an extension of time. This, if admitted or made in writing or entered on the docket (which latter is the better course), will be recognized as valid by the Court. *State* v. *Price, supra,* and cases there cited.

We take it, therefore, that in the present case the extension of time was in fact not made by the Court, but was simply an agreement of the parties entered on the minutes. The time allowed, whether by statute or consent, for service of the case on appeal is to be counted not from the last day of the two weeks during which the term of the Court could have been held, but is to be computed from the day of the actual adjournment of the Court. *Turrentine* v. *Railroad,* 92 N. C., 642; *Walker* v. *Scott,* 104 N. C., 481. The day of the actual adjournment of Court does not appear upon the record. Counting, therefore, from the last day upon which the term could have been held, Saturday of the second week, which was December 10, 1893, the twenty days upon which, by consent, service could have been made expired December 30th. The attempted service upon January 4th was a nullity and must be disregarded. *Peebles* v. *Braswell,* 107 N. C., 68; *Cummings* v. *Hoffman,* 113 N. C., 267. The absence of case on appeal is not ground for a motion to dismiss, but the judgment will be affirmed if there are no errors upon the face of the record proper. *Cummings* v. *Hoffman, supra; Lyman* v. *Ramseur,* 113 N. C., 503. As the appellant is a plaintiff who has submitted to a nonsuit and appealed there can be no errors in the record proper which could avail him. Upon the submission by plaintiff to a nonsuit judgment should have been entered against him for costs. This was not done. No judgment having been entered below, the appeal must be dismissed. *Taylor* v. *Bostic,* 93 N. C., 415, and other cases cited; Clark's Code, 2d Ed., 559. It is true if it appeared that the omission of the judgment is a mere inadvertence and the appellant has merits, the Court would remand the case to supply the judgment instead of dismissing the appeal. *Baum* v. *Shooting Club,* 94 N. C., 217.

As further action will probably be taken it is proper to say that the summons having been served upon W. A. Fanning, named in the summons, the fact that the judgment was entered up against "W. H. Fanning" does not necessarily vitiate and render it void. The appellant may consider whether he should not take proceedings by a motion in the cause to correct the judgment. See cases collected in Clark's Code, 2d Ed., 645–648. The correction of a mistake in the name of a party after judgment is expressly allowed by *The Code*, §273. Such amendment may be made at any time and does not come within the limitation of "one year after notice thereof" prescribed by section 274.

This action, having been brought in another county, cannot be treated as a motion in the cause, as was done in *Jarman* v. *Saunders*, 64 N. C., 367.

Appeal Dismissed.

NATT ATKINSON v. GEORGE W. PACK.

Real Estate Broker—Contract, breach of—Measure of Damages.

1. Where a real estate agent negotiated a sale of land for a person who agreed with him in writing to convey it to the purchaser who was to pay the agent's commissions and such person refused to convey it, the agent may recover in an action for the breach of the contract by showing that the intending purchaser was able and willing to carry out the trade.
2. The measure of damages for such breach of contract is the amount the agent would have received as commissions from the purchaser if the bargain had been complied with by the defendant.

CIVIL ACTION, tried before *Armfield, J.*, at December Term, 1893, of BUNCOMBE Superior Court.

A jury trial was waived, and the Court found the following facts:

"1. That the plaintiffs, at the several times hereinafter named, were and are still real estate brokers, engaged in the business of negotiating sales and purchases of real estate in said county and elsewhere, and these facts were known to the defendant, and at said times defendant owned, or had the power to sell, the tract of land in said county known as the Tennent or Antler Hall place.

"2. That early in June, 1890, one Harding, desiring to become the purchaser of said place, caused his attorney to ask plaintiffs whether or not they held it for sale, and being told that they did not, said attorney requested them to make inquiry of the defendant if the place was for sale, and if so, at what price it could be purchased.

"3. That the plaintiffs, through their Natt Atkinson, in pursuance of said request, thereupon inquired of defendant, who was then in New York City, whether he desired to sell said Tennant place, and if so, the price at which he would sell the same; and on the 13th day of June, 1890, defendant, in answer to said inquiries, sent a telegram in the following words:

"'TO CAPT. NATT ATKINSON:

"'Place not for sale, but twenty-five thousand would be accepted if taken at once. One hundred and thirty-four acres. G. W. PACK.'

"Upon receipt of this dispatch, the plaintiffs understanding therefrom that they might proceed to offer said place to said Harding at said price of twenty-five thousand dollars, inquired further of defendant whether he would pay plaintiffs commissions out of the said twenty-five thousand dollars, to which inquiry defendant replied by telegram on said 13th day of June, 1890, as follows:

"'TO NATT ATKINSON:

"'Offer will not be accepted after to-morrow. Must be free of commissions from me. G. W. PACK.'

"4. That thereupon plaintiffs informed said Harding of the terms upon which the place in question could be purchased, and that he would have to pay their commissions; and said Harding accepted the terms and agreed to pay the commissions.

"5. That on the next day, after first communicating with said Harding, the said Natt Atkinson sent to the defendant a telegram in these words:

"'TO G. W. PACK,
"'*Fifth Avenue Hotel, New York City:*

"'Your telegram of yesterday only received this morning. Your offer is accepted. We have sold the property at price given. Send letter embodying terms of sale. Party don't want to close papers before first of July unless you require it. Wire saying this is all right.
NATT ATKINSON.'

"And to this telegram the defendant, on the 14th day of June, 1890, sent the following in reply, to-wit:

"'TO NATT ATKINSON:

"'Your offer, twenty-five thousand dollars net for Tennent property, is accepted. Must be closed in ten days. Ten thousand cash, balance to suit purchaser. Interest eight per cent. Will write. G. W. PACK.'

"And on the same day defendant wrote the plaintiffs a letter, as follows:

"'FIFTH AVENUE HOTEL,
"'Madison Square, New York.

"'MY DEAR SIR:—Your telegram of this morning is received and I have just wired you: 'Your offer, twenty-five thousand dollars net for Tennent property, is accepted. Must be closed in ten days. Ten thousand cash, balance to suit purchaser. Interest eight per cent. Will write.' The growing crop is, of course, reserved, and Mr. Miller, the tenant on the place, holding over from Mrs. Tennent, has the right to remain until January 1st, 1891. He has not the right, however, to occupy the mansion, but only the smaller house and farm buildings. I go from here to Cleveland, where I will be Monday morning, and remain three or four days. I go thence to Asheville; as I expect to be there before the expiration of the ten days, please write me at Cleveland, giving me the name and residence of purchaser, and I will have a deed made out and properly executed and bring it with me to Asheville. Please write me how the laws of North Carolina require the deed to be executed when done in another State.

"'Very truly yours, G. W. PACK.

"'TO CAPT. NATT ATKINSON, Asheville, N. C.'

"Upon receipt of the foregoing letter the plaintiffs furnished defendant the information therein asked for, and on the 19th day of June, 1890, defendant wired plaintiffs in the words and figures following:

"'JUNE 19, 1890. (Dated Cleveland, O., 19).

"'TO CAPT. NATT ATKINSON:

"'Cannot conveniently delay closing later than 24th. Will have deed there. G. W. PACK.'

"6. That said Harding was duly notified that the transaction must be closed and completed not later than the said 24th day of June, 1890, and that he would have to pay for said property said sum of twenty-five thousand dollars and also plaintiffs' commissions, and said Harding accepted the terms, and the defendant was informed by the plaintiffs that Harding would be ready to pay the net price for the aforesaid property, and the defendant caused a deed of conveyance to said Harding to said property to be prepared, signed and acknowledged, and he brought the same to Asheville on the 23d day of June, 1890, intending to deliver it to Harding if he complied with the terms of the offer of sale aforesaid.

"7. That said Harding was ready and willing to pay to the defendant the full net sum of twenty-five thousand dollars, and also pay plaintiffs their commissions, and to accept a conveyance of said Tennent place on the said 24th day of June, 1890; and the said Natt Atkinson, one of the plaintiffs, called on the defendant on the said day at his residence in Asheville and informed him of the readiness and willingness of said Harding to comply with defendant's terms and accept said deed, but defendant declined to conclude the transaction on the ground that the time in which the contract was to be closed had expired.

"8. That the plaintiffs made the inquiries stated and shown in the complaint between the plaintiffs and defendant at the instance of Harding's attorney for the purchase of said tract of land, and the said Harding and defendant were never brought together in person and did not meet for personal negotiations.

"9. That the usual commissions charged by real estate brokers on sales or purchases of real estate, where no rate is fixed, is five per cent. of the amount of the purchase price; and in this case the said Harding agreed to pay commissions, without agreement as to the rate, on condition that the transaction was consummated, while the defendant stipulated with plaintiffs that he was not to pay any commissions."

Upon the foregoing facts as found and stated by his Honor, defendant prays the Court to hold, as matter of law applicable to such facts:

"1. That plaintiffs having procured a valid contract from the defendant under which the said Harding might have compelled a conveyance of the land to him, the transaction was so far consummated as to entitle the plaintiffs to demand from Harding the payment of their commissions, and the plaintiffs cannot waive their right as against Harding and compel the defendant to pay commissions, or damages in lieu thereof.

"2. That although defendant was legally bound to convey the land to Harding, and there was a breach of his contract in failing to convey to him, plaintiffs are not in position to complain, and they cannot maintain their action against the defendant to recover damages for, or growing out of, such breach of said contract.

"3. That upon the facts found the plaintiffs were the agents to purchase, and not of the defendant to sell, the land in question, and the plaintiffs cannot recover of the defendant on the ground of agency for him.

"4. That as the facts show that plaintiffs were actively engaged in conducting the negotiation for Harding for the purchase of the land, and represented him in the matter, they were not mere middle-men to bring the parties together and as such entitled to recover of defendant for alleged services.

"5. That the plaintiffs are not entitled to recover of the defendant upon the facts in the case."

The Court declined to hold for the defendant as prayed, and refused all the prayers numbered from 1 to 5, inclusive. and found, as conclusions of law, that plaintiffs were the agents of both the proposed purchaser and the defendant in the transaction referred to in the foregoing facts, and that the plaintiffs were entitled to recover damages of the defendant upon the facts of this case, and assessed their damages at twelve hundred and fifty dollars, and allowed them interest on said sum from the 24th day of June, 1890. and rendered judgment for plaintiffs accordingly.

To his Honor's refusal to apply the law to the facts found by him as prayed for, and to the conclusions of law found and to the judgment rendered, the defendant excepted and appealed to the Supreme Court. It was agreed that if the plaintiffs were entitled to recover at all the amount of damages assessed was correct.

Mr. James H. Merrimon, for plaintiffs.
Mr. M. E. Carter, for defendant (appellant).

MACRAE, J.: The question whether the plaintiffs were the agents of both Harding and defendant, or of Harding alone, or whether they were middle-men whose part was performed when the proposed seller and purchaser were brought together, is not a very important, nor, indeed, in in this case a necessary one. The authorities cited by the learned counsel for the defendant abundantly sustain the plain principle that one cannot, without the knowledge and consent of both parties, act as agent both for the vendor and purchaser, because the interests he attempts to represent are adverse to each other. If he were simply a middle-man whose business was to bring parties together so that they might make their own bargain there would be no valid reason why he might not stipulate for commissions from each party.

In this case it is sure that the plaintiffs were real estate brokers in the city of Asheville, and it will at once be understood that their business was the negotiating of sales and purchases of real estate between other parties upon commission. In the course of their business the plaintiffs negotiated with the defendant for the sale of the property named to one Harding at a price agreed to be paid on a day certain, the plaintiffs' commissions upon said sale to be paid by the purchaser, Harding.

Every detail of the transaction seems to have been arranged and upon the day set for the completion of the sale the plaintiffs, during business hours, notified the defendant that Harding was ready and willing to comply with the terms of sale; whereupon, without giving any valid reason therefor, defendant declined to fulfill his contract.

This action is brought not to recover *commissions* out of defendant, for it was expressly stipulated that defendant was to receive $25,000 *net* for the land, and that plaintiffs must look to Harding for their commissions. But the action is brought to recover damages for the non-performance of a contract, the evidence of which was in writing, made with plaintiffs that defendant would sell the said land to Harding at the price stated. The defendant seems to admit that there was a breach of contract on his part with some one, but he contends that it was with Harding and that the latter is the party responsible to plaintiffs for their commissions. But there were plainly two contracts made by plaintiffs, the one with defendant, the effect of which was that plaintiffs would provide a purchaser of the land at the agreed price, commissions to be paid by the purchaser; the other with the purchaser, that he would pay the plaintiffs' commissions upon the conclusion of the sale.

If through the negotiation of plaintiffs the parties had been brought together and had concluded the trade between them, the plaintiffs would have been entitled to their commissions from Harding, the purchaser, according to the terms of their contract. But this action is for *damages;* the *gràvamen* of the charge is that defendant committed the wrong and injury upon plaintiffs by a refusal, without cause, to comply with his contract *with plaintiffs* to sell the land to plaintiffs' principal, with the distinct understanding that plaintiffs were to be compensated by the purchaser. The natural effect and consequence of this refusal by defendant was the loss by plaintiffs of their commissions, and, in arriving at the measure of damages, his Honor (trying the case by consent without a jury) considered the amount of commissions agreed upon.

The case of *Cavender* v. *Waddingham*, 2 Mo., 551, is very much like our own. There the plaintiffs were employed by defendant to purchase for him a certain lot of land, but the plaintiffs' commissions were to be paid by the vendors; plaintiffs made the negotiation, procured the deed to be made to defendant according to the contract and tendered the same, demanding the purchase-money for the vendors; defendant refused to comply with his contract, and plaintiffs sued him to recover damages for the loss of their commissions by reason of the refusal by defendant to comply with the contract. It was held that plaintiffs had shown good cause of action against defendant.

There having been, then, a contract between plaintiffs and defendant, and defendant having refused to perform his part of it without fault of plaintiffs, they are entitled to recover as damages such sum as will compensate them for the loss sustained by the breach of contract by defendant. The measure of this damage is easily ascertained—the amount of commissions which plaintiffs would have been entitled to receive from the purchaser if the contract had been carried out.

No Error.

JAMES PAINE et al. v. M. M. CURETON et al.

Practice—Appeal—Dismissal—Motion to Re-instate.

1. Where an appeal was dismissed because not docketed before the perusal of the district to which it belongs, as provided in Rule 17, and appellant moved to re-instate on the allegation that he had directed the Clerk to send up the transcript and paid the fees therefor in advance, the motion will be denied, for, although such allegation would have been a sufficient answer to the motion to dismiss if affidavit had been filed to such effect and a *certiorari* applied for, yet it was laches not to interpose such affidavit and show excuse for the failure.
2. Practice in regard to docketing appeals discussed by CLARK, J.

In this case an appeal by defendants was dismissed on motion of plaintiffs and defendants moved to re-instate upon the grounds mentioned in the opinion of the Court.

Messrs. Justice & Justice, for plaintiffs.
Mr. F. I. Osborne, for petitioners.

CLARK, J.: This appeal, not having been docketed before the close of the call of causes of the district to which it belongs, was dismissed upon certificate filed as provided in Rule 17. At the same Term the appellant moved to re-instate on the allegation that he had directed the Clerk to send up the transcript and had paid the fees therefor in advance, and that there was no laches on his part. This would have been a sufficient answer to the motion by appellee to dismiss, if the appellant had then filed affidavit to that effect and asked for a *certiorari*. It was laches not to do this, and appellant offers no excuse therefor. An appellant cannot simply take an appeal and pay the Clerk's fees for transcript and thereafter leave the appeal to take care of itself like a log floating down a river or corn put in the hopper of a mill. The appeal requires attention. The rule is that the appeal must be docketed at the first Term of this Court held after the trial below, before the perusal of the district to which it belongs. If this is not done the appellee has the right to docket certificate and dismiss under Rule 17. This the appellee did. There are two exceptions to this rule: First, when counsel having disagreed on the case, the Judge fails to settle the case on appeal in time without default on the part of the appellant; in that case the appellant must docket the transcript of the record proper and when the district is reached ask for a *certiorari* for the case on appeal. *State* v. *Freeman*, at this Term, and cases cited. Second, if no part of the record at all is sent up and it appears that the appellant has paid the Clerk's fees and directed the transcript sent up, and there is otherwise no default on the part of the appellant, he is entitled to a *certiorari* if asked for during the call of the district. This the appellant did not do, and shows no excuse for his failure to do so. It is true that if appellee does not on the call of the district move to docket and dismiss the appellant may afterwards, during such first Term of this Court after the trial below (but not later), docket the appeal. *Triplett* v. *Foster*, 113 N. C., 389. The rules of practice as to appeals are summarized in *Porter* v. *Railroad*, 106 N. C., 478.

We may say in passing that the petitioner shows no merits in the case itself. The action was begun by a landlord against his tenant for summary ejectment. The defendant admitted the tenancy, but pleaded that she was the true owner and by mistake was unaware of the fact at the time of entering upon the premises under the lease, and attempted to oust the jurisdiction of the Justice of the Peace on the ground that title to land came in controversy. This was properly held against her. *Foster* v. *Penry*, 77 N. C., 160; *Parker* v. *Allen*, 84 N. C., 466; *Hahn* v. *Guilford*, 87 N. C., 172; *Dunn* v. *Bagby*, 88 N. C., 91. This was the only point raised below. Motion to Re-instate Denied.

N. A. PENLAND et al. v. J. R. CRAPO et al.

Pledge—Collateral—Rescission.

Where, in order to induce plaintiff to postpone the sale of his land under deed of trust, C. promised to pay $280 on another debt which C. owed him and the sale was stopped, and plaintiff went with C. and W. to a bank where W. gave the banker at plaintiff's request a certified check to be held as collateral security for the $280: *Held*, that plaintiff was entitled to have the check condemned to the payment of the $280, and that W. could not demand that plaintiff release certain lots from the operation of the deed of trust as had been agreed upon between C. and W.

CIVIL ACTION, tried at August Term, 1893, of BUNCOMBE Superior Court, before *Armfield, J.*, and a jury, the purpose of the action being to subject collateral security to be condemned for the payment of a debt.

The plaintiff introduced a deed of trust from J. R. Crapo and William Elliott Gonzalles and wife, dated 10th of February, 1891, to Duff Merrick, trustee, made to secure to the plaintiff two notes, one for $2,000 and one for $10,600.

N. A. Penland, the plaintiff, testified that there had been default in payments required to be made by the deed of trust, and that he had had the land described in the deed of trust duly advertised by Duff Merrick, trustee, for sale on the ---- day of -------, 1891; that on the day of the proposed sale the defendant Crapo said to him that if he would postpone the sale for thirty days he would pay to him, Penland, $280, a sum due to him from Crapo on other debts not secured by the deed of trust. He agreed with Crapo that if he, Crapo, would pay him these other debts he would postpone the sale for thirty days; that the sale at this time was being cried by the auctioneer, who, when this proposition was made by Crapo, stopped crying the sale until Crapo could go to the bank to get the money and came back without it, saying that he could not get the money, but he had a friend, the defendant Willet, who would secure the $280 to him, Penland, at the Battery Park Bank; that he then went to the Battery Park Bank, a few yards away, when Crapo and Willet came into the bank. Willet had a check or certificate of deposit of $1,000 on a bank at Beaufort, S. C., and he indorsed it and handed it at his, Penland's, direction to Mr. James P. Sawyer, the president of the Battery Park Bank, who was to hold the same for the security of the $280 until Willet could get $280 from the bank in Beaufort, S. C., and pay it into the Battery Park Bank for him, Penland, which he was to do at once. He, Penland, did then postpone the sale as agreed; that after this the defendant Willet asked to let him, Willet, take up the certified check or certificate of deposit and let him put the $300 in the bank to be held in the place of it, and he refused, but that afterwards $300 was left in the bank to be held in same way check or certificate was held; afterwards Willet wanted him to release some lots. He refused to release them unless he would pay him, Penland, $80 per lot as required by the deed of trust; Willet, several days afterwards, said he was to have from Crapo several lots for the $280; that he knew nothing about any arrangement made between Crapo and Willet about the $280; that he considered the transaction as one securing the payment to him of $280 for postponing the sale, or he would not have postponed it.

Duff Merrick was introduced by the plaintiffs and testified that he was the attorney for all the parties in drawing the deed of trust; he advertised the land as required by the deed of trust or mortgage, and was about to sell; Crapo said he had a friend, Captain Willet, the defendant, who would put up the $280 to pay Penland to postpone the sale for thirty days; the auctioneer was, he thinks, crying the sale, and Penland and Willet came back and said they had arranged the matter, and sale was stopped. Since this suit was brought $300 was paid into the bank in place of the $1,000 certificate; the defendant Battery Park Bank had the certificate at the commencement of this suit. He thinks he drew some deeds conveying some lots to Willet on the day after sale was postponed, but that Penland knew nothing about it.

James P. Sawyer was introduced as a witness by the plaintiffs and testified: "He is president of the Battery Park Bank and was such at the time of the transaction spoken of by Mr. Penland. Willet and Crapo came to the bank and said Willet wanted to pay Penland $280 and Willet began to draw a check, but did not finish it. He left with the bank on deposit a certificate of deposit of the Bank of Beaufort, S. C., of $1,000 and indorsed it, to be held by the bank as security to Penland for $280. In a few days after this Willet came in and wanted the certificate of deposit, saying the matter had fallen through. He, Sawyer, informed him that he could not give up the certificate unless Penland agreed to it. Penland refused to agree to it; after that W. W. Jones, Esq., attorney for Mr. Willet, deposited $300 in the bank in the place of the certificate to him. This was done after the suit was brought."

The defendant J. R. Crapo testified as follows: "Willet deposited $280 in the Battery Park Bank to pay Penland and then tore up the check, and then said to him, Crapo, in the presence of Sawyer, Penland and Rankin, that he was drawing the check to pay for four lots. He had sold to Gonzalles; that he, Crapo, had told Willet he could buy four lots for $280, and he said he would take them and went down to the bank and deposited $280 to pay for the lots; that he, Crapo, introduced Gonzalles to Willet the day before; he knew Willet for several years, but had no business dealings with him. Penland agreed before the deposit was made, when he got $280, in Moore & Merrick's office. Merrick was there, but does not know that he was present, near enough to hear it; that the company, Crapo and Gonzalles, owed Sawyer $150, for which Penland was bound, and he, Crapo, owed some other debts, but did not know how much. Penland said he would sell by the trustee unless he got $280 in cash. Gonzalles had offered to sell all his interest to Willet and Willet agreed to buy on the morning before the sale. Gonzalles backed out. He sold out to Gonzalles that day. Gonzalles agreed to sell the four lots. He asked Penland before he went to see Willet that he would release the lots if he got $280. This may have been on the streets."

The defendant Willet testified: "He did not know Gonzalles, but had seen Crapo. Crapo came to him on the day of sale by trustee, Merrick, and said $280 was wanted to complete the trade and wanted to know if he, Willet, would buy four lots for $280, and he, Willet, agreed to pay $280 for four lots. He wrote this down at the time. Crapo told him they would be released by Penland. Crapo came back and said Gonzalles refused to sell to him, but they wanted the $280. He went to the bank to make his check to be held till the deeds were made to him for the four lots. He started to write the check to Merrick, but tore it up. Penland then came in and said he wanted to know where his money would be. He, Willet, told him there in the bank. He, Willet, then gave a certified check for $1,000 to a gentleman to secure the $280. Never indorsed by him. About one week afterwards he asked Penland for his deeds and he, Penland, refused to make them. He left the check for no other purpose than to pay for the lots. As he went out of the bank after depositing the check he told Penland he did not want to stay here and wanted his deeds and that Penlad said they would be ready to-morrow. He never got the deed. Crapo told him, to induce him to take the lots, that there would be a profit of $385 on the four lots."

Plaintiffs then introduced J. E. Rankin, who testified as follows: "I am cashier of the Battery Park Bank and was in the bank at the time the check was deposited by Willet. The substance of the talk between the parties was that there was a sale of some land and that $280 was needed to stop it, and Willet was to become paymaster to Penland for that amount. Willet deposited a certified check on the Bank of Beaufort, S. C., for $1,000 to secure the $280 to Penland. I did not hear all that was said. Did not hear what the consideration of Willet was. The check was not indorsed; it was not to be collected."

The plaintiff N. A. Penland, being recalled, testified: "I did not tell Gonzalles or Crapo at any place that I would release the four lots for $280. I told them that I would release the four lots if they would pay me $80 per lot as agreed in deed of trust. Don't remember any conversation with Willet about deed. Don't remember hearing Willet say in the bank anything about the $280 being for four lots."

Mr. Merrick, being recalled by plaintiffs, testified: "I never heard Penland say anything about the release of four lots. I heard Willet say something about $280 being for four lots afterwards."

This was all the evidence offered in the case.

The Court, upon the conclusion of the introduction of the evidence, being of opinion in favor of defendants and having so expressed its opinion, the plaintiffs submitted to a judgment of nonsuit and appealed.

Mr. Charles A. Moore, for plaintiffs (appellants).
Mr. W. W. Jones, for defendant.

PER CURIAM: The judgment of nonsuit must be set aside. Viewing the evidence in the light most favorable to the plaintiff, as we are required to do in this appeal, we find in it what seems to us amply sufficient to sustain his demand that the check or certificate of deposit placed by the defendant Crapo in the Battery Park Bank at plaintiff's direction shall be condemned to the payment of the sum which that defendant had promised to pay him, as he alleges.

Error.

R. T. JONES v. J. M. CRAIGMILES.

Contract—Charge on Separate Estate of Married Woman—Consideration—Consent of Husband—Action to Enforce Such Charge.

1. A note signed by husband and wife containing a clause, "and the said husband hereby consents that the above note shall be a charge on the separate estate of his said wife for the payment of this note," expressly charges the separate personal estate of the wife.
2. In the case of an express charge it is not necessary that it should appear that the consideration is beneficial to the wife nor that the separate estate should be specifically described.

3. To make a contract of husband and wife an express charge upon her separate personal estate it is unnecessary that the assent of the husband shall be signified by a separate clause, his execution of the paper jointly with his wife being a sufficient compliance with the law in this respect.
4. It is necessary in an action to enforce an executory contract of a married woman, as a charge upon her separate estate, that the complaint should describe the property to be charged.
5. In an action to have the contract of a married woman declared a charge upon her separate estate equity will, in proper cases, lend its aid by the appointment of a receiver or by other interlocutory orders necessary to protect the rights of the creditors.

CIVIL ACTION, heard, upon demurrer to the complaint, at Fall Term, 1893, of CHEROKEE Superior Court, before *Armfield, J.*

The action sought to have a note executed by the defendants declared a charge upon the separate personal estate of the *feme* defendant, a married woman. The complaint alleged:

"1. That the defendants executed to C. F. Powell & Co. their promissory note on or about the 20th day of December, 1889, for the sum of $81.07 in the following words and figures, to-wit:

"'$81.07. Six months after date we, J. M. Craigmiles and M. S. Craigmiles, promise to pay to the order of C. F. Powell & Co. the sum of eighty-one (81) dollars and seven (7) cents for value received, and the said J. M. Craigmiles, husband of the said M. S. Craigmiles, hereby consents that the above note shall be a charge on the separate property of his said wife for the payment of this note. Witness our hands and seals, this 20th day of December, 1889.

"'(Signed) J. M. CRAIGMILES, [Seal.]

"'M. S. CRAIGMILES, [Seal.]'

"2. That the said note was executed for the individual benefit and improvement put upon the individual property of the said M. S. Craigmiles, who is, and was at time of contract, the wife of defendant J. M. Craigmiles.

"3. That the said M. S. Craigmiles is owner in her individual capacity of property subject to the payment of this debt, as this plaintiff is informed and believes.

"4. That this plaintiff is owner by assignment to him for value of the note sued upon in this action, and that the same is now due to this plaintiff."

Wherefore plaintiff asks the judgment of the Court:

"1. For the sum of the said debt and interest and costs of the action.

"2. That the same be adjudged to be a charge on the individual personal property of the said defendant M. S. Craigmiles, wife of the said J. M. Craigmiles, and that the same be sold to pay the same."

The *feme* defendant, M. S. Craigmiles, demurred to the complaint upon the ground "that the complaint fails to allege that the contract sued upon was made with the written consent of her husband; and that the note sued upon was given for necessaries for this defendant, or her family; and that the contract made by her was such a contract as she was authorized by statute to make.

"Also because it fails to allege that said note was executed as a charge upon any particular piece of real estate or any particular personal property.

"It fails to set forth what real estate or personal property, if any, this defendant owns."

The demurrer was sustained, and plaintiff appealed.

Messrs. J. W. & R. L. Cooper, for plaintiff (appellant).

Mr. Edmund B. Norvell, for defendant.

SHEPHERD, C. J.: From the context of the writing sued upon we are of the opinion that it was intended to expressly charge the separate estate of the wife, and it is effective for that purpose so far as the separate personal estate is concerned. In the case of an express charge it is not necessary that it should appear that the consideration is beneficial to the wife; nor is it necessary that the separate estate should be specifically described. *Flaum* v. *Wallace*, 103 N. C., 296. It is also unnecessary that the assent of the husband should be signified by a separate clause. His execution of the paper jointly with his wife is a sufficient compliance with the law in this respect. *Farthing* v. *Shields*, 100 N. C., 289.

This obligation, however, being in the nature of an executory contract and enforceable only in equity by declaring it a charge upon the separate estate (*Dougherty* v. *Sprinkle*, 88 N. C., 300), it is necessary that the complaint should describe the property sought to be charged, and as the plaintiff has failed to do this the demurrer was properly sustained by his Honor. Such is the logical effect of holding an action of this kind to be in the nature of a proceeding *in rem.* 1 McCord Married Women, 254. See also, *Bell* v. *Arrington*, 94 N. C., 247, in which the proper averments were made. In *Dougherty* v. *Sprinkle*, *supra*, the case of *Hulme* v. *Tenant*, 1 Brown C. C., 16, and 2 Story Eq. Jurisprudence, 1397, were cited, and it will be seen from these authorities and many others referred to in the notes that the property, or at least so much of it as is sought to be charged, must be described in the complaint.

In *Sexton* v. *Fleet*, 6 Abbott Prac. Rep. N. Y., 10, it is said: "Whenever this equitable relief has been granted to a creditor he has set forth in his bill or complaint the particular property out of which he has asked to have the debt satisfied (*Vanderhoyden* v. *Mallory*, 3 Barb. C. R. 9;

N. A. Coal Co. v. *Dyett*, 20 Wend., 570, and see all the cases collected in the English and American notes to *Hulme* v. *Tenant*, 1 White & Tudor's L. C. Eq., 65; see also, McQueen Husband and Wife, 294; 1 Daniel Chancery Prac., 205); and where bills have been filed to enforce a charge upon the wife's property, merely averring that she has a separate estate, without stating its character, nature or kind, they have been dismissed."

It may be observed, in conclusion, that in proceedings of this kind equity will in proper cases lend its aid by the appointment of a receiver or such other interlocutory orders as may be necessary to protect the rights of a creditor. *Coon* v *Brook*, 21 Barb., 548. Affirmed.

R. J. COOK v. THE NEW YORK CORUNDUM COMPANY.

Attachment—Insufficiency of Affidavit—Amendment—Appeal.

1. The Court has power to permit amendment of an affidavit in attachment proceedings which was insufficient as failing to state how the debt arose, and from an order granting such amendment no appeal lies.
2. An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment.
3. Parties who intervene in attachment proceedings cannot be heard to object to the irregularity of the same, that being a matter between the parties to the main action.

This was a MOTION to vacate a warrant of attachment, heard before *Armfield, J.*, at December Term, 1893, of SWAIN Superior Court, in an action pending in Jackson county.

The plaintiff, R. J. Cook, began his action against the defendant and filed his affidavit in attachment upon which a warrant was issued and levied upon certain real estate in Jackson county on the 7th of October, 1893. On the 13th of the same month Sheppard Homans began his action against the same defendant and upon affidavit had a warrant of attachment issued and levied upon the same property that had already been seized under the plaintiff's warrant of attachment. Subsequently the defendant and said Homans moved, under section 377 of *The Code*, to vacate the plaintiff's warrant upon the ground that the affidavit of plaintiff was insufficient in law to justify the issuing of the warrant. The plaintiff's counsel admitted the insufficiency of the affidavit in that it fails to state how the indebtedness arose and that it was due by note, and moved to be allowed to amend his proceeding by filing another affidavit. This motion was granted and the defendant's motion to vacate was denied, and thereupon the defendant and said Homans appealed.

Messrs. J. H. Merrimon and *G. H. Smathers*, for Homans (appellant).

No counsel *contra*.

MACRAE, J.: As the plaintiff has admitted the first affidavit to have been insufficient it will not be necessary for us to examine it.

His Honor had full power to permit the amendment, as has often been held by this Court (*Sheldon* v. *Kivett*, 101 N. C., 408), and there was no right of appeal from the order allowing the amendment.

The appeal is from the refusal of his Honor to vacate the warrant of attachment. The Court having the power to allow the amendment, its only purpose could have been to cure any irregularity which might have existed in the proceedings upon which the warrant of attachment was based. It could not be contended that the defect alleged was such as to render the attachment proceedings void. The power of amendment could not be exercised for the giving of life to that which was void, but it is in furtherance of justice for the curing of defects which might between the parties have invalidated the warrant, but which could not be attacked in a collateral proceeding. Such amendments, when made, have relation back to the beginning of the proceeding sought to be amended. This principle being so well understood, no rights can be acquired by third parties by reason of subsequent attachments based upon the irregularity in question.

The lien in this case of the first warrant had attached and had not been divested. A sale of the property under it and a proper conveyance would have passed the title. A refusal of his Honor to permit the amendment, if the affidavit were insufficient, would have been followed by an order vacating the attachment, and thereupon the second warrant and levy would have constituted the first lien. It is unnecessary to cite authorities to the effect that that which is simply irregular is not void. If there was a defect in the affidavit it was cured by the amendment, which his Honor had the right to permit. So the plaintiff's lien had attached when the proceedings were begun by Homans, the second attaching creditor, and no rights acquired by the issue or levy of the second warrant have affected it. No vested rights had been acquired by the creditor Homans by reason of his levy which have been divested by the amendment of plaintiff's affidavit.

Third parties are permitted to intervene not to defend the main action between plaintiff and defendant, but to assert their superior title to the property in controversy.

They could not be heard to object to the irregularity of the attachment proceedings, that being a matter between the parties to the main action. *Blair* v. *Puryear*, 87 N. C., 101.

Affirmed.

LAURA E. JONES v. THE CITY OF ASHEVILLE et al.

(APPEAL OF DEFENDANT CAMPBELL).

Practice — Appeal Bond, failure to file — Motion to Dismiss — Notice.

1. The discretion vested in this Court by ch. 135, Acts of 1889, to permit an appeal bond to be filed here will not be exercised unless reasonable excuse be shown for the failure of appellant to file it below.
2. No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days' notice required, for a motion to dismiss, by ch. 121, Acts 1887, applies only when there is an irregularity in the bond or in the justification of sureties.

Messrs. F. A. Sondley and *J. H. Merrimon*, for plaintiff.
Mr. Charles M. Stedman, for defendant (appellant).

CLARK, J.: In this cause no appeal bond appears to have been given, and the appellee moves to dismiss. The defendant presented no good excuse for the failure, but offered to file the bond here. In *Harrison* v. *Hoff*, 102 N. C., 25, it was held that the discretion vested in this Court by ch. 135, Acts 1889, to permit an appeal bond to be filed here would not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking below as required by *The Code*, §§549 and 552. In that case MERRIMON, J., said: "Whether the power will or will not be exercised must depend largely upon the facts and circumstances of each case. It may be said, however, that in all cases the appellant must show reasonable cause for his failure to give the undertaking promptly, as required by law, else relief will not be granted. It is no part of the purpose of the statute to excuse or encourage gross neglect." No notice is required of a motion to dismiss when no appeal bond is filed. The twenty days' notice required for a motion to dismiss by ch. 121, Acts 1887 (Clark's Code, section 560), applies only when there is a mere irregularity in the undertaking on appeal or in the justification of the sureties. Appeal Dismissed.

W. O. WOLFE AND WIFE v. RICHMOND PEARSON.

(DEFENDANT'S APPEAL).

Action for Damages—Abating Nuisance—Municipal Corporations—Power to Change Grade of Street—Ratification by City of Unauthorized Act of Individual.

1. Under section 3803 of *The Code*, applicable to all towns and cities, in the absence of other modes provided specially by charter, giving authority to keep in proper repair the streets, etc., of the towns, and by the charter of Asheville (chapter 111, Private Acts 1883), which gives authority to provide for repairing the streets, removing nuisances, and to condemn land for opening, widening and straightening streets, the city of Asheville has authority to change the grade of a street.
2. A city is liable for damages caused by grading streets only when the work is done in an unskillful manner.

3. Ratification is equivalent to a previous authority; therefore the ratification by a city of an act done by an unauthorized person to the injury of another, but which, if done by the city, would have been rightful, relieves such person from liability as a trespasser although the ratification was after suit brought by the injured party.
4. Where a nuisance is both public and private in its effect it may be abated by one to whom it is specially injurious.
5. Where defendant, assuming to act for a city, changed the grade of a street and removed therefrom plaintiff's wall which encroached thereon so as to constitute a nuisance, and the city ratified his acts after suit brought, plaintiff could only recover damages resulting during the time between the act and the ratification.

CIVIL ACTION, tried before *Hoke, J.*, and a jury, at Spring Term, 1892, of BUNCOMBE Superior Court.

The complaint was as follows:

"1. That the plaintiff Julia E. Wolfe, wife of plaintiff W. O. Wolfe, is now, and was at the time hereinafter mentioned, the owner in fee-simple and in possession of certain lot lands in the city of Asheville, county of Buncombe, and State of North Carolina, bounded as follows (here follows description).

"2. That there were at the time hereinafter named, and have been for many years prior thereto, a street or public highway on the north or front side of said lot and adjoining thereto, and also a street or public highway on the east side thereof.

"3. That about the year 1881 the *feme* plaintiff hereto, while owning said lot of land, obtained from the proper authorities of the city of Asheville what said town authorities informed said plaintiff would be the permanent grade of the said street or Court Square in front of said lot of land and adjacent thereto; and having reference to said grade said plaintiff erected, at cost of about three thousand five hundred dollars ($3,500), a certain brick store-house on said lot, consisting of three stories (including what is called the basement). That said house was built with special reference to the grade of the said street or public highway in front of the same, and so constructed that the first story or floor thereof was on a level with the grade of said street or public highway, thereby making the same convenient and accessible from said street and suitable for a store-house, ware-room, or for other ordinary business purposes.

"4. That on the ____day of__________ ____1890, the defendant hereto, not regarding or considering the rights of the public in said street or highway, nor the rights of the said *feme* plaintiff in the same, did unlawfully, tortuously and wrongfully commit and make certain common nuisance in said street or public highway by changing the grade thereof, and digging down and lowering the same five or six feet in front of the premises of the plaintiff, above described, thereby leaving the first floor of the plaintiff's store some five or six feet above the level of the street, rendering the same inconvenient and inaccessible and not easy of approach, thereby to a great extent destroying the value of the same and otherwise injuring said property of the plaintiff by the unlawful and wrongful acts aforesaid, to the plaintiff's great damage, to-wit, in the sum of three thousand dollars ($3,000)."

The defendant, Richmond Pearson, answered as follows:

"1. That the defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of the complaint.

"2. That the allegations of the second paragraph of the complaint, in so far as they relate to a street or public highway on the east side of said lot prior to 1890, are, as the defendant is informed and believes, untrue.

"3. That the defendant has no knowledge of the matters alleged in the third paragraph of the complaint, but is informed and believes, and so avers the facts to be, that these allegations are untrue.

"4. That the allegations of the fourth paragraph of the complaint are untrue.

"5. And for a further defence the defendant says that if he made any change at any place in the grade of the public square, or any part of it, or of a public street, or any part of it, at any time in said city, he did so with the knowledge, consent, concurrence and approval of said city of Asheville and the proper authorities thereof, which said city and its authorities had the legal right to change such grade or to authorize such change, and such change was afterwards by said city and authorities duly indorsed, approved and accepted.

"6. And for a further defence the defendant says that if he made any change at any place in the grade of the public square, or any part of it, or of any public street in said city, or any part thereof, at any time, such change was duly authorized by those having the legal right to authorize such change, and was made with their knowledge, consent and concurrence and was afterwards approved by them.

"7. And for a further defence the defendant says that if, at any time, he made any change, at any place, in the grade of the public square of said city, or any part of it, or any public street of said city, or any part thereof, such change did not injure the plaintiffs or either of them.

"8. And for a further defence the defendant says that if the defendant did dig any in front of the store-house and lot of *feme* plaintiff he dug down a bank there only and said bank was at that time in the public street at that place, and had been placed there by the *feme* plaintiff, as defendant is informed and believes, and prevented the public from passing and repassing along the said public street at that place, and was a public nuisance, and prevented the defendant from passing along said public street to and from his land, which lay immediately to the eastward thereof, or nearly so, and within one hundred feet or less thereof, and thereby did the defendant special injury, and the defendant did no more in such digging than was necessary to protect his rights and enable him to reach and pass to and from his said land along said public street and prevent a recurrence to his said land by blocking up the approach to the same as aforesaid.

"9. And for a further defence the defendant says that the complaint does not state facts sufficient to constitute a cause of action."

The issues submitted to the jury and the responses were as follows:

"1. Did defendant wrongfully dig down and remove earth near plaintiff's building, thereby causing damage to plaintiff's property? Answer, Yes.

"2. What amount of damage is plaintiff entitled to receive of defendant by reason of the injury? Answer, Fifty dollars."

The action was to recover damages for injury to a store-house, built abutting upon the south-eastern corner of the public square in Asheville, N. C., and the title to the property was admitted to be in *feme* plaintiff. There was evidence tending to show that plaintiff W. O. Wolfe, for his wife, had caused the store-house to be constructed on a lot adjoining the south-eastern corner of the public square. The building abutted upon said square, fronting towards the north. The house was built in 1887. Beyond the building, and bounding same on the east, was Market street, which entered the square from the street designated in the plot of the town as a street forty feet wide. There was evidence that at the time this building was constructed this street, known as Market street, was very little used as a public thoroughfare, and was regarded and used only as an alley. The level of said street was some lower than the square, which it approached from the south at an incline.

There was evidence that said W. O. Wolfe on constructing said building had erected a wall along Market street some eight feet beyond his own lot, and extending north and south parallel to his building and running along Market street into the square eight feet and more, and had filled in the wall so as to level so much of Market street to the level of his store building, and to the level of the public square in front of his building.

That before bringing this suit and prior to the acts of the defendant herein complained of the approach to said store building from the square was on a level, but the approach to the building from Market street was made inconvenient by the wall, which was vertical from the last approach from two to three feet, the wall leaving an entrance of thirty-two feet. Approach from Market street to square was not otherwise impeded. Plaintiff W. O. Wolfe testified that before building this wall he had obtained permission from the Board of County Commissioners. He also testified that before commencing his building he had spoken to a member of the Board of Aldermen and to one of the street committee for information as to the grade of the public square where it bounded his lot, and was referred by them to one Mr. Aston, who was at that time city engineer, and so acting, on such reference, witness applied to Mr. Aston and was informed by him that the grade was as witness then found it.

The charter and amendments of the city of Asheville were introduced, showing the grade of the streets to be in control of aldermen.

There was also evidence tending to show that sometime about one month or more before bringing this action, to-wit, in November, 1890, defendant, who had bought property in a part of the city that could be approached along Market street, and desiring to enhance the value of his purchase by making greater facility of access thereto, hired a number of hands and against the protest of plaintiffs dug down and hauled away a part of the earth from the public square in front of plaintiffs' building, and tore away and removed a part of the wall built by plaintiffs, which extended along Market street into the square, designing and intending to make the approach from Market street into the square on a less incline and easier grade. That the excavation came within eight feet from front door of plaintiffs' building, causing an average depression of thirty-five inches, making the approach from the square much more inconvenient. The public square at this place was proved to be seventy-five yards wide or more. There was evidence of plaintiffs tending to show that the action of the defendant had injured the value of plaintiffs' building as much as twenty-five hundred or three thousand dollars; that the rental value was reduced one-half, and that it would cost at least $2,500 to lower house to present grade of street, which was the only feasible way to repair the injury. There was evidence on part of the defendant tending to show that the action of the defendant had benefited the property by making the approach better from Market street and by placing the plaintiffs' building as a corner store upon the square and Market street, and rendered a frequented thoroughfare by the action of the defendant. There was also evidence tending to show the time and cost required to replace the earth. Defendant also placed in evidence the act of the Board of Aldermen of the city of Asheville taken after the injury complained of and after action commenced, establishing grade of street at the level made by the defendant.

The act of the Board of Aldermen referred to is as follows:

"MAYOR'S OFFICE, January 9, 1891.

* * * * * * * *

"The attention of the Board being called to the fact that Richmond Pearson had, at his own expense, widened the northern entrance to Market street and had used some stone belonging to the city for the purpose of making steps to the front of certain stores on south Court Square; and it being the opinion of the Board that said work and the use of said stones was one of public necessity and convenience, the same is therefore approved by the Board."—Minutes, page 91.

The evidence is set out in the case, but it will be unnecessary to state it here: in addition to that which has already been referred to there was evidence on the part of the defendant tending to prove that before doing the work defendant "asked the Mayor of the city, who went with witness to the work, and he told witness to go ahead and tear it down; it was a nuisance. Afterwards, learning that the Mayor probably had no authority, reported the whole matter to the Board of Aldermen as to what he had done," and hence the action of the Board.

The Court charged the jury as follows:

"That plaintiff claims in the action damages for injury to his building by defendant. Defendant claims that he has done plaintiff no actionable wrong: (1), because he was abating a nuisance; (2), because the action of the Board of Aldermen of the city of Asheville on January 9, 1891, approving act of defendant as aforesaid, related back and justified the conduct of defendant.

"Neither position can be maintained by defendant on this evidence, and if the jury believe the evidence they will answer the first issue Yes."

There was a verdict for plaintiff. Motion for a new trial by defendant for errors of Court in its rulings on questions of evidence and for error on charge in holding that the action of the city authorities did not protect defendant, and in holding the defendant on the entire evidence could not maintain his position that he was acting in lawful abatement of nuisance. Motion overruled and defendant excepted. Judgment on verdict for plaintiff. Appeal by defendant.

Messrs. Charles A. Moore and *Gudger & Martin*, for plaintiffs.

Mr. F. A. Sondley, for defendant (appellant).

MACRAE, J.: It will not be necessary to consider in their order the objections to evidence and exceptions thereto, as the case will be disposed of in the consideration of the errors alleged in the instructions of his Honor to the jury.

The defendant rested his defence on the merits upon two grounds: (1), because he was abating a nuisance; (2), because the action of the Board of Aldermen, approving his act, related back and justified the conduct of defendant. His Honor held that neither position can be maintained by defendant on the evidence, and he directed the jury if they believed the evidence to answer the first issue "Yes."

We have examined the acts constituting the charter of Asheville in force at the time of the act complained of and the general law concerning cities and towns, and find that, by section 3803 of *The Code*, applicable to all towns and cities unless other modes are expressly provided in the charter, the commissioners "shall provide for keeping in proper repair the streets and bridges in the town in the manner and to the extent they may deem best." By the charter of Asheville, ch. 111, Private Acts of 1883, sec. 19, among the powers expressly given to the Board of Aldermen are to "provide for repairing and cleansing the streets and sidewalks," also "to suppress and remove nuisances." And by sections 37 and 38 an elaborate system is provided for the condemnation of land for streets and the assessment of benefits and damages, "whenever in the opinion of the aldermen it is advisable to obtain land or the right of way in the city for the purpose of opening new streets or widening or straightening streets already established or for making of culverts or water-ways for carrying water out of the streets." But we have been unable to find any special provision, however desirable it may be that some special provision should by law be made, for the grading of the streets, and the assessment of benefits and damages arising upon the change of such grades.

This city has, then, special power and the general powers incident to all towns and cities for keeping its streets in repair, which powers would, in our opinion, include authority to make such changes in the grading of its streets as the Board of Aldermen might deem necessary; and that the city was only liable for damages caused by such grading when the work was done in an unskillful manner. *Meares* v. *Wilmington*, 9 Ired., 73; *Wright* v. *Wilmington*, 92 N. C., 156. It is equally clear that one, acting for himself and without authority from the Board of Aldermen, who undertook to change the grade of a street, would render himself liable in an action by the party injured for such damage as might have been sustained by the owner of lands or buildings upon said street, by reason of such assumption of the functions of the city by him. And if such person assumed to be acting for another than the rightful authority such other person might ratify the act after it was done, and so become a joint trespasser with the wrong-doer himself.

But the effect of a ratification by the city of an act done by an unauthorized person under color of authority from the city, which act, if it had been done by the city itself, would have been rightful, would be to relieve such person from liability as a trespasser. A municipal corporation has, by its charter, granted to it certain portions of the sovereignty of the State, for the purpose of assuring to the people the right of local self-government. It acts under delegated authority, and within the scope of its powers it represents the sovereignty itself.

And the fact that the ratification of defendant's act was done after action brought against him by the plaintiffs for the injury sustained, cannot affect the result of such ratification. "The rule of law is that he for whom a trespass is committed is no trespasser unless he agrees to the trespass; but if he afterwards agrees to it his subsequent assent has relation back, and is equivalent to a command, according to the well-established maxim, *omnis ratihabitio retrotrahitur et mandato priori æquparatur.*" *Hall* v. *Pickersgill*, 5 E. C. L. Rep., 83.

The city had the right to grade the street, and by its subsequent assent it has in effect commanded the act complained of; if it were a person who had no right to do the act and the same were done in its behalf it would be a joint trespasser with defendant, but having that right the defendant is relieved of liability if he assumed to do it for and on behalf of the city. The city has assumed any liability which may have accrued to defendant and now this liability would be only for injuries sustained by reason of unskillfulness in the work.

This doctrine of ratification will in some instances apply to torts as well as to contracts. One may under some circumstances adopt a wrong and become a wrong-doer by ratification, as where one acts for another, *not assuming to* *act for himself, but for the other person,* without any precedent authority, and afterwards the act is ratified by the principal. Cooley on Torts, 127. "If an individual ratifies an act done on his behalf the nature of the act remains unchanged; it is still a mere trespass, and the party injured has the option to sue either; if the Crown ratifies the act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from liability the person who commits the trespass." *Buron* v. *Denmar*, 2 Exc. Rep., at p. 188.

So, an act which, if done by the individual, may be a trespass, but which if done by proper authority is lawful, may be ratified by such authority when it was done in its behalf. For instance: Defendants, creditors of an uncertificated bankrupt, seized his goods to hold for the assignee not yet appointed; this act was ratified by the assignees, who had a right to seize them; and although this ratification was done after action brought by the bankrupt against the trespassers it was held that the defendants were not liable to plaintiff. *Hall* v. *Pickersgill*, *supra.*

It must be an act which would have been lawful if done by proper authority, for, where a State Tax-collector seizes property in satisfaction of taxes, refusing to accept in payment certain coupons, according to a statute of Virginia, he is liable for trespass because the act was void. *Poindexter* v. *Greenhow*, 114 U. S., 270.

The learned counsel for plaintiffs, contending that the city could not ratify the act of defendant, especially after suit brought, rely upon *Page* v. *Belvin*, 14 S. E. Rep., 843; but in that case it was held that by the terms of the charter of the city of Richmond the grading of streets could not be done until there had been a resolution or ordinance of the city council *previously* enacted directing the improvement to be made; the act would have been unlawful if done by the city in any manner except in that prescribed by the charter; therefore the city could not ratify an act which it was not authorized to do itself. "The council can only act by previously enacted ordinances." In this case it was also held that by reason of the injury a right of action against defendants had vested, and upon settled principles it could not be divested by subsequent action of the council. In the case before us the city of Asheville could have graded the street under its powers in the charter, without such previous action. If the grading was done by one assuming to act for it such act, upon equally well-settled principle, was subject to ratification, and such ratification, as we have seen, had relation back to the act itself, and took away no vested right, because the right to recover damages was subject to be defeated by the subsequent ratification.

The same distinction will be found in all other cases cited for this position, for in each of them the act or contract was not in its origin binding upon the corporation by reason of not having been made in the mode prescribed by the charter, and therefore not a subject of ratification. In *Zottman* v. *San Francisco*, 20 Cal., 102, cited by plaintiffs' counsel, it was said: "Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally." There having been some evidence tending to show that the defendant assumed to act for the constituted authorities of Asheville, it follows that when his Honor held that defendant's contention could not be maintained upon the evidence as to the ratification and its relation back to the alleged wrongful act, he did not advert to the testimony tending to prove that defendant assumed to act for or on behalf of the city; this was a material fact to be passed upon by the jury, and in case they found it in favor of defendant he would have been entitled to the instruction.

As to the question whether the defendant was liable for the removal of the wall and earth which had been erected at the opening of Market street into the public square, his Honor held that upon the evidence defendant could not relieve himself from liability to plaintiffs upon the ground that he was abating a nuisance. As the acts of grading the street and of removing the wall may be separated, it is important to inquire whether this wall and the earth packed between it and plaintiffs' line, upon the street, was a nuisance, and could defendant have abated it? Without going back to a discussion of what constitutes a nuisance in general, we may say, as applicable to our present case, that any permanent obstruction of a street or road, a public highway, by which the public are impeded in their passage over said highway, is a nuisance, and that according to the evidence this wall and filling in, erected upon the street or public square, certainly in the absence of any express authority from the Board of Aldermen to do so—and this authority cannot be proven by testimony to the individual consent of one or more members of the Board—was a public nuisance, because it obstructed a portion of the street or square. *State* v. *Long*, 94 N. C., 896.

It was broadly stated in *State* v. *Dibble*, 4 Jones, 107, that any unauthorized obstruction in a navigable stream by means of a bridge or a dam of any kind is a public nuisance which any one may abate. This proposition is qualified by Mr. Justice READE in a case of much the same character, *State* v. *Parrott*, 71 N. C., 311: "A common or public nuisance may be abated by *any person who is annoyed* *thereby*." And this was a most proper qualification, for although the first expression has been often used by the Judges, it was applied to the special facts then under consideration. It would be a proposition most dangerous to the peace of communities to say without qualification that any one may abate a public nuisance. As we are not attempting to write a treatise or a text-book it will not be necessary or proper for us to discuss the subject of the abatement of nuisances in its ever varying phase; our province is to apply known principles already established to the facts of particular cases. It would not be difficult to demonstrate the general rule to be that as to nuisances entirely public no private person has a right to abate them, and it is very well established that where a nuisance is both public and private in its effect it may be abated by those to whom it is a private nuisance. We do not undertake to lay down any general rule as to how far the individual may go in the abatement of the nuisance which is an injury to him. Suffice it to say that his Honor should have instructed the jury that the encroachment upon the street or square, not being proven to have been authorized, was a public nuisance. And upon the evidence it was a question to be submitted to them under proper instructions whether *this* encroachment upon the public highway was specially injurious to defendant, for upon the determination of this question rested his right to remove it without resort to an action. We refer to 2 Wood on Nuisances, chapter 21, for an interesting and instructive discussion of the subject of abatement of public nuisances by act of private persons, and an industrious collection of authorities thereon. There must be a new trial.

Error.

(PLAINTIFFS' APPEAL).

The plaintiff made the following exceptions to rulings of the Court on the admissive and objective evidence:

1. On cross-examination plaintiff was permitted, over objection by his counsel, to give to jury the description of the store and ground prior to the injury complained of. Plaintiff objected. Overruled, and plaintiff excepted.

2. Witness Lee was allowed to testify that defendant owned property across from plaintiff on Market street, and that access to it was made less convenient by plaintiff's wall. Plaintiff excepted. This evidence was admitted at the time over plaintiff's objections on the position maintained by defendant that the plaintiff's wall was a nuisance, which defendant had a right to abate. The Court, being of opinion, on the whole evidence, that defendant had shown no such nuisance as would justify his action, so ruled, and the effect of this evidence was withdrawn from the jury.

3. This witness was also allowed to testify, over plaintiff's objection, the time and cost required to put square, etc., in condition it was in prior to the injuries. Plaintiff excepted.

4. Defendant Pearson was allowed to testify that the action of the defendant had enhanced the value of plaintiff's property, describing how the change of grade was beneficial. Plaintiff objected. Overruled, and plaintiff excepted.

5. The minutes of the Board of Aldermen were read establishing grade of street at present level. Admitted, and plaintiff excepted. This was admitted on the claim of defendant that he could show authority from the city for his act, but the defendant having failed to show such

authority or that he claimed to act pursuant to such, it was decided that the resolution of the Board of Aldermen was no protection to defendant, and the effect of the evidence was withdrawn from the jury. The connection of evidence will more fully appear in the copy of entire evidence made by the Clerk.

The plaintiff requested the Court for the following instructions:

"1. That the plaintiffs are entitled to recover in this action for damages arising both before and after suit; that any damage found to be done to the property of the plaintiffs by reason of the defendant's cutting down the street are original and can be recovered for as full compensation in this action.

"2. That if from the evidence the jury shall find that the defendant cut down the street willfully and wrongfully and with malice to the plaintiffs, and wickedly and without regard to the rights of the plaintiffs, they can find such punitory or vindictive damages as they shall find ought to be paid.

"3. That if the jury find from the evidence that the plaintiffs' property has been made worth less than before in money by reason of the defendant cutting down the street in front of it, the damage would be such permanent and original damage as would entitle the plaintiffs to recover full compensation in this action."

The Court explained the nature of the action, stating among other matters not objected to:

"1. That plaintiff claimed in this action damages for injury to his building by defendant in digging down and carrying away the earth from the public square adjacent to his property. Defendant contended that he had done plaintiff no actionable wrong:

"(1). Because he had authority from the city of Asheville for his conduct, or such conduct had been subsequently ratified by the city.

"(2). Because he was removing a nuisance; that neither position could be maintained by the defendant, and on the evidence, if the jury believed it, they should answer the first issue 'Yes.'

"2. Measure of damages was the cost of replacing the earth as far as its removal worked an injury to plaintiffs' property, and the inconvenience working pecuniary injury to plaintiffs in use of building for the time required to replace the earth under all circumstances of the case. This inconvenience could be estimated in this case by the impaired rental value of the property for the time the earth was necessarily away, there being no evidence of actual loss of rents for such time.

"3. Evidence as to increased or diminished value of property not to be considered by the jury in question of damages to property as a building site. Only considered on value of building as tending to show increase or diminution of rental value for the time building remained in its injured condition.

"4. Damage not entire loss to building. As between the parties plaintiffs had a right to replace the earth, and the subsequent order of the city authorities making the change permanent was not the act of Pearson. The city authorities have control of the grade of their streets, when acting in their judgment, and for this defendant is not responsible. But their action in this instance would not relate back so as to justify the conduct of defendant, who neither acted nor claimed to act under their authority, and the rule for damages was as above given."

There was verdict for plaintiffs as set out on record. Plaintiffs moved for a new trial for errors of Court in its rulings on question evidence, and for error in the charge in measure of damages. Motion overruled and plaintiff excepted.

Judgment on verdict and appeal taken.

Plaintiffs excepted for that the Court erred:

"1. In overruling the plaintiff's objection to evidence and admitting the same over his said objections, as hereinbefore specified.

"2. In refusing to admit certain evidence offered by them, as hereinbefore specified.

"3. In refusing to give the instructions prayed for by the plaintiffs, as hereinbefore set forth, to-wit, in refusing to give prayers for instructions Nos. 1, 2 and 3.

"4. In instructing the jury as follows: 'That the measure of damages was the cost of replacing the earth as far as its removal worked an injury to plaintiffs' property and the inconvenience working pecuniary injury to plaintiffs in use of building for the time required to replace the earth.'

"5. In instructing the jury that the damage of plaintiffs was not the entire loss to the building, as between the parties the plaintiffs had the right to replace the earth, and the subsequent order of the city authorities making the change permanent was not the act of Pearson; that the city authorities have control of the grade of streets when acting in their judgment, and, for this, defendant is not responsible."

MACRAE, J.: The conclusion we have reached upon defendant's appeal renders it unnecessary that we should consider any of plaintiffs' exceptions other than those directed to the charge of his Honor upon the measure of damages.

We are of the opinion that there is no error of which the plaintiffs can complain in the instructions given, and defendant's appeal did not show any exception to this part of the charge. As it appeared upon the trial that the removal of the wall and earth and the grading of the street had been adopted by the city and consequently that the earth and wall could not be replaced, it would be difficult to compute any other damage resulting to plaintiffs than such inconvenience as may have arisen and existed between the time of the act complained of and the adoption thereof by the city. There was no testimony upon which the jury could have been instructed that they might give vindictive damages. No Error.

M. C. KISER et al. v. JESSE COMBS.

Action to Recover Possession of Land—Mortgagee—Immaterial Error.

1. The legal title of lands passes by a mortgage to the mortgagee,.who may maintain an action to recover possession of the same after default.
2. When the plaintiff is entitled to recover in any view of the testimony, error in giving instructions in his favor is harmless and not ground for reversal of the judgment.

ACTION to recover land, heard before *Graves, J.*, and a jury, at July Special Term, 1893, of CHEROKEE Superior Court.

On the trial the plaintiffs offered in evidence a deed from the defendant, Jesse Combs, to one Blackwell, dated July 22, 1889, a mortgage deed from Blackwell and wife to plaintiffs, dated 18th December, 1887, and the deed of R. L. Cooper, commissioner, to plaintiffs, dated August 25, 1892, together with the record in a suit by the plaintiffs against Blackwell and wife which had been brought to the Fall

Term, 1891, of Cherokee Superior Court, with summons, affidavit for order of service by publication, order of publication and judgment at Fall Term, 1891. The defendant objected to the record on the ground that the affidavit made by R. L. Cooper, attorney, as the foundation for the order of service by publication, was not in compliance with the requirements of sections 218 and 219 of *The Code*, and that the judgment of foreclosure therein was null and void, as well as the deed of R. L. Cooper made in pursuance thereof.

His Honor held that he was precluded from passing on the question involved by the action of his predecessor in the judgment rendered at Fall Term, 1891, and charged the jury that the judgment could not be collaterally attacked.

The affidavit of R. L. Cooper, on which the publication of summons was obtained, was as follows:

R. L. Cooper, being duly sworn, says: "That he is attorney for the above-named plaintiff. That in the above entitled action now pending in the Superior Court of said county the Sheriff of said county has returned the summons issued to him in said action, indorsed, 'Due search made; defendant not to be found in Cherokee county.' That, as affiant is informed and believes, defendants therein cannot, after due diligence, be found within the State; that defendants above named are proper parties to said action, which is to foreclose a mortgage deed on real estate in this county executed by defendants.

"Wherefore plaintiff prays the Court that service of summons be made on said defendants by publication."

Messrs. J. W. & R. L. Cooper and *E. B. Norvell*, for plaintiffs.

No counsel *contra*.

AVERY, J.: Whatever difficulty we might have otherwise encountered in establishing the identity between the present plaintiffs and the grantees, to whom the legal estate passed by the mortgage deed of Blackwell and wife, we are relieved by the admission in the answer that the mortgage deed was executed to "the plaintiffs." The fact that the foreclosure sale was ineffectual to transfer the title of Blackwell and wife, if admitted, would not therefore materially affect the right of the plaintiffs to recover on their legal title in this action, in which they declare and demand judgment that they are the legal owners and entitled to the possession. *Wittkowsky* v. *Watkins*, 84 N. C., 456; *Bruner* v. *Threadgill*, 88 N. C., 361. In this view of the controversy it becomes unnecessary to determine whether the affidavit, which constituted a part of the foreclosure proceeding, was insufficient, as was contended on behalf of the defendants. If the defendants were in truth non-residents of the State it may be questionable whether a more specific allegation that they had property in this State was not essential in order to give the Court jurisdiction *in rem*. The plaintiffs, being in possession, may determine whether the proceeding, a copy of which accompanied the statement of the case on appeal as an exhibit, was amenable to objection for failure to comply with the provisions of *The Code*, §218, or under the Fourteenth Amendment to the Federal Constitution, as insufficient to subject the property of a citizen of another State. *Winfree* v. *Bagley*, 102 N. C., 513. Another suit may still be brought for foreclosure if upon an investigation of the facts they are so advised.

The Judge might have told the jury that in any view of the testimony the plaintiffs, as the admitted holders of the legal title by virtue of the mortgage deed, were entitled to recover even if the foreclosure suit was not conclusive on the defendants, and it is therefore immaterial whether there was a harmless error in his instructions or not.

The judgment is Affirmed.

R. L. COOPER v. G. P. AXLEY.

Action to Recover Land—Agent—Estoppel on Agent to Deny Principal's Title.

In an action to recover land a defendant who went into possession under the plaintiff's grantor, as his agent, is estopped to deny plaintiff's title.

CIVIL ACTION for the recovery of land, tried at July Special Term, 1893, of CHEROKEE Superior Court, before *Graves, J.*, and a jury.

The plaintiff offered in evidence:

"1. Deed from G. W. Akin and wife to J. W. Blackwell, dated December, 1889, and registered June, 1893.

"2. Deed from Blackwell and wife to J. E. Graham, dated January 8, 1891, registered January 30, 1891.

"3. Deed from J. E. Graham and wife to J. W. Blackwell, dated January 30, 1891, registered January 31, 1891. This is a mortgage deed.

"4. Deed from Blackwell to R. L. Cooper, dated February 23, 1891, and registered May 8, 1892. This is a mortgage deed. These deeds all cover the land in controversy, which is part of tract No. 34 in district No. 3.

"5. Plaintiff offered a grant from the State of North Carolina to Montgomery Bell for tract No. 34, of which the land in dispute is a part, which grant is dated May 31, 1853."

G. W. Akin, a witness for plaintiff, testified: "I was in possession eight or nine years; Blackwell went into possession under me; he took possession in 1889, at the date of his deed from me. I have not been in the possession since then. Blackwell built a store-house on the land."

A. W. Axley, for the plaintiff, testified that he knew the land. "G. P. Axley is in possession, and has been since

January, 1891; he went there as my clerk; J. E. Graham and myself bought a stock of goods in the store-house on the land from Blackwell and went in under Blackwell. G. P. Axley has been there ever since as my clerk. I was two months in possession under Graham. Graham and I rented the property at $5 per month. G. P. Axley refused to give up land after dissolution between witness and Graham." Witness paid rent to Graham until he understood his brother bought.

R. L. Cooper, the plaintiff, testified: "G. P. Axley was in possession February 23, 1891. I told Axley I wanted him to pay rents. He said he had examined the statute and records and found no deed from Akin to Blackwell had been recorded and he had bought from Akin."

The plaintiff offered a Sheriff's deed for the property, but as no point arises on this branch of the case it was not set out.

The charge of the Court, which was in writing, is as fol-laws:

"The plaintiff claims under two titles—first, by Sheriff's deed. On this line plaintiff has failed to show title in Blackwell, and therefore cannot recover on that ground, for he does not show anything in Blackwell which makes a good title."

There is no exception to this part of his Honor's charge.

"The second ground upon which the plaintiff bases his claim is that the defendant is estopped to deny the plaintiff's title. It is a general rule that the plaintiff must make his title good against all the world. But to this there is the exception that in some cases the defendant is not allowed to deny the plaintiff's title, and thus he may recover although he does not show title in himself; hence if the defendant went into possession under the plaintiff or those from whom he has deeds—that is, under Blackwell and under Graham—he cannot be heard to deny the plaintiff's title. So the question is narrowed down to this: 'Did the defendant enter as the tenant or under the authority of Graham or Blackwell?' If so, he cannot deny these titles, and Cooper, having deed from Blackwell, would be entitled to the land as against him. How this matter is in fact is for the jury to determine. It is not denied that in some instances a tenant may show a better outstanding title.

"In this action, although plaintiff has shown a grant to Montgomery Bell and has not connected the plaintiff with it by mesne conveyance, still he would not be allowed to avail himself of such apparent better title so long as he remained in possession claiming the land as his own."

To the whole of the charge on the second ground on which the plaintiff bases his claim the defendant excepted.

The defendant requested the Court to charge that "by his own evidence, by the grant to Montgomery Bell, having shown he had no title to the land in controversy, but by his own showing the title was in Bell, the defendant is not estopped to deny plaintiff's title, and that plaintiff cannot recover.

"That if G. P. Axley was found by the jury on the land as the clerk only of A. W. Axley he, the defendant, is not estopped to deny the plaintiff's title."

Both these requests were refused by the Court, and defendant excepted.

There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

Messrs. J. W. & R. L. Cooper and *Edmund B. Norvell*, for plaintiff.

No counsel *contra*.

AVERY, J.: Graham, claiming under a deed from Blackwell, during the month of January, 1891, put the defendant as his clerk in possession of the land in dispute. On the 31st day of the same month Graham reconveyed to Blackwell, who had previously conveyed the premises to him. A person holds possession for himself or by his agents, his servants or his tenants. *Williams* v. *Wallace*, 78 N. C., 354; *Ruffin* v. *Overby*, 105 N. C., 86. Axley was therefore holding as the agent or servant of Graham, when the latter reconveyed to Blackwell, through whom the plaintiff claims by mesne conveyances. Being his servant, Axley is as certainly estopped by Graham's deed as is the grantor himself, with whom he is in privity. He occupies the same relation as a tenant of Graham as did Graham himself to those holding under his deed, and it does not seem that he was entitled to the favor which the Court extended in submitting the case under the rule of evidence applicable, where contestants deraign title from a common source. The defendant in this case was estopped by the deed of Graham, with whom he is in privity, not confined simply by a rule of evidence to testimony tending to connect himself with the better title shown in Montgomery Bell or his heirs by the grant dated May 31, 1853. But he failed upon the testimony offered to connect himself with that grant, and in any view of the evidence, therefore, the plaintiff was entitled to recover.

Judgment Affirmed.

JEFFERSON REEVES & CO. v. JOHN F. SPRAGUE AND J. R. DAVIS.

Injunction—Breach of Contract—Good-will in Trade.

Where S., a druggist, in selling out a part of his stock to plaintiffs, agreed not to engage in the drug business in a certain town either directly or indirectly and afterwards sold the remainder of his stock to defendant D., who gave a mortgage upon the stock to secure the purchase price, and conducted a drug business in the town: *Held*, in an action to enjoin D. from conducting such business, that he is not an agent of S., the mortgagee, in the sense of conducting a business forbidden by the contract between S. and plaintiffs, and cannot be enjoined from carrying it on.

The defendant Sprague, in August, 1893, being engaged in the drug business in Waynesville, sold a portion of his stock to the plaintiffs, and in the contract was the following stipulation:

"And it is further agreed that for the space of three years from the date of this contract the said John F. Sprague will not enter into the drug business in the town of Waynesville, and the said John F. Sprague does by these presents covenant and agree with the said Jefferson Reeves & Co. that during said space of three years he will secure the said Jefferson Reeves & Co. against J. B. S. McIntosh, D. M. McIntosh or Dr. F. A. Walter entering into the drug business in the said town of Waynesville, either jointly or severally, or being interested in the drug business in the said town during the said time, either directly or indirectly."

Subsequently, in December, 1893, the defendant Sprague sold the remainder of the stock to the defendant Davis, who gave notes for the purchase-money secured by a mortgage upon the goods so sold.

On the 2d day of January, 1894, the plaintiffs issued summons against the defendants and on the same day, upon petition and affidavit of Jefferson Reeves, one of the plaintiffs, obtained from his Honor Geo. A. Shuford, Judge of the Twelfth Judicial District, an order to show cause before him, the said Judge, at Chambers in Asheville, N. C., why an injunction should not be granted against the defendants enjoining them from the sale of drugs, chemicals, etc., in the town of Waynesville. The said order, together with a copy of the said affidavit of Jefferson Reeves, was served on J. R. Davis, one of the above-named defendants. The motion was heard before *Shuford, J.*, at Chambers in Asheville, on January 12, 1894, upon affidavits and exhibits filed by the plaintiffs and the defendants. Upon hearing the affidavits his Honor granted the injunction until the trial of the cause, from which order and judgment the defendant Davis appealed.

Messrs. J. C. L. Gudger and *Herbert Ferguson*, for plaintiffs.

Messrs. J. B. Batchelor, Ferguson & Moody and *Avery & Silver*, for defendant (appellant).

BURWELL, J.: We have carefully examined the affidavits and exhibits filed in this cause and find nothing that in our opinion entitles the plaintiffs to enjoin the appellant, J. R. Davis, from carrying on the business of a druggist in the town of Waynesville. The defendant Sprague is bound by his contract with the plaintiffs not to engage in that business at the place named, but the defendant Davis is not under any such obligation. Indeed, there is no contract whatever between him and the plaintiffs. He bought a stock of drugs from Sprague, it seems, as he was free to do. He secured the payment of the purchase-money therefor to Sprague by giving him a mortgage thereon, and as mortgagor he is in possession and was engaged in carrying on the business when stopped by the injunction order issued in this cause, which not only enjoins the defendant Sprague and his agents and servants, but also the defendant Davis and his agents and servants. Now, while it is true that in some sense the mortgagor of a stock of goods may be said to be the agent of the mortgagee, that principle has no application, we think, to the matter now under consideration. It cannot be seriously contended that Sprague is violating a contract not to engage in the business of a druggist in Waynesville merely because he has a lien on a stock of drugs at that place.

We find in the evidence adduced no substantial foundation for the plaintiffs' allegation that the mortgage made by Davis to Sprague is a sham, and that Davis is merely the agent of Sprague. If, in fact, he is such agent the injunction against the defendant Sprague and *his* agents is sufficient for the plaintiffs' purposes. They produce no proof whatever, as it seems to us, that the appellant is Sprague's agent—only facts that might raise a suspicion that he is. To stop his lawful business upon the evidence now before us seems unreasonable. Error.

R. M. DEAVER v. HARVEY JONES.

Action to Recover Land—Practice—Consent Judgment Cannot be Vacated Except by Consent—Deeds—Description—Insufficient Description.

1. An order or judgment made by consent cannot be vacated or modified, even at the term at which it is entered, without the consent or acquiescence of all parties to the action, unless it appear affirmatively that its rendition was procured by the mutual mistake of all the parties or by fraud; therefore,

2. Where, in the trial of an action, the verdict of a jury was set aside by consent, it was error to re-instate the verdict despite the objection of one of the parties, it not appearing affirmatively that the first order was procured by fraud.
3. A deed showing nothing on its face which either absolutely locates or points to any extrinsic evidence from which the beginning or any one of five succeeding corners can be ascertained is void for insufficiency of description.

Action for the recovery of land, tried before *Armfield, J.*, and a jury, at August Term, 1893, of Buncombe Superior Court.

Upon the return of a verdict by the jury the plaintiff proposed to the defendant that the verdict should be set aside by consent of the parties, and the Court, upon such consent, made an order setting the verdict aside and granting a new trial.

On the day following the plaintiff moved the Court to set aside the order setting aside the verdict, and for judgment according to the verdict.

The defendant resisted the motion, but the Court made an order re-instating the verdict, and defendant excepted and appealed.

Mr. J. H. Merrimon, for plaintiff.

Mr. Charles A. Moore, for defendant (appellant).

Avery, J.: Where an order or judgment is made by consent it cannot be vacated or modified even at the term at which it is entered without the assent or acquiescence of all the parties to the action. Whether interlocutory or final such judgments are irrevocable, except with concurrence of all whose consent was requisite in the first instance, unless it appear affirmatively that their rendition has been procured by the mutual mistake of both or all the parties, or by the fraudulent practices of one or more of them. As a rule all judgments are *in fieri* during the term at which they are rendered, and it is in the breast of the Judge to abrogate or alter on his own motion, or at the suggestion of counsel, judgments by consent constituting the exception. 1 Black on Judgments, sections 305, 308, 319. In reference to an interlocutory judgment, so entered, Justice MERRIMON said in *McEachern* v. *Kerchner*, 90 N. C., 179: "The Court could correct its own errors, but it could not add to, modify or correct the agreement." Where such judgment is final it can be set aside only by civil action on the ground of mistake of both parties or for fraud—not on motion in the cause. *Stump* v. *Long*, 84 N. C., 616; *Vaughan* v. *Gooch*, 92 N. C., 524; *Kerchner* v. *McEachern*, 93 N. C., 447; *Fowler* v. *Poor*, 93 N. C., 466; *Mock* v. *Coggin*, 101 N. C., 366; *Smith* v. *Fort*, 105 N. C., 446.

The idea of impeaching an order or a judgment for fraud, during the term or subsequently, involves necessarily the affirmative allegation of the existence of the fraud. The general rule of pleading is that fraud must be alleged and proved when it is relied upon as a ground for impeaching a decree or even a deed, unless it be fraud in the *factum*. When, therefore, it is admitted that the verdict of the jury was not only set aside by order of the Court with the consent of both parties, but that the suggestion of granting a new trial was first made by the plaintiff, we cannot assume, upon the maxim *omnia presumuntur rite acta*, that when the Judge subsequently entered another order re-instating the verdict, despite the objection of the defendant, he acted upon testimony showing that the making of the order vacated was procured by fraud. A party to an action acquires a right to the benefits to be derived from a consent order, and cannot be deprived of such advantage against his own will, unless one of the essential prerequisites to the exercise of the power to annul it (fraud or mutual mistake) is made to appear affirmatively. Freeman on Judgments, section 111*a*. We can no more proceed on the assumption that the Court acted upon testimony sufficient to warrant what was done than we could take it for granted, where nothing more appeared than that a consent order of reference had been stricken out on motion of one party and in the face of the objection of the other, that the Court would not have revoked such an order without evidence sufficient to warrant its action. Nothing is more clearly settled than that sufficient cause must be made to appear affirmatively for vacating such orders of reference without the assent of all of the parties (*Smith* v. *Hicks*, 108 N. C., 248), and that they affect substantial rights, so as to subject them to review on appeal. *Stevenson* v. *Felton*, 99 N. C., 58. Upon the same principle evidence *aliunde* may be adduced to attack the award of arbitrators for fraud, but it is never assumed that there was such testimony unless it so explicitly stated. We think that the Judge erred in re-instating the verdict without the defendant's consent. Whether, in the absence of evidence of fraud, a Judge has the power to restore to vitality any verdict that has been set aside either by consent or at the instance of one only of the parties, is a question that it is not necessary to discuss.

As the cause will again stand for trial we deem it proper to indicate to the parties our view of the other question which must necessarily arise again, and upon which the decision of the main issue in a large measure depends.

We think that the deed from Russell Jones to J. Harvey Jones, dated February 9, 1883, was void for uncertainty in the description. The first five corners are stakes, with no calls for pointers that fix their location or make them anything else than imaginary points. The sixth, Tate's corner, as we must, in passing upon the sufficiency of the description without the proof *aliunde* that was actually offered, assume, could have been located. From that point the surveyor might have run north with Tate's line fifty poles and located the black oak corner. By running from the next corner, a stake, forty-three poles east of it and in Burgin Jones' line, might have been found at the intersection with that line, or, if it could not be found at the end of the distance, the last call, which is "south to the beginning," could not be located by running indefinitely in that direction, but only by reversing the calls from Tate's corner, in order, if possible, to ascertain where the beginning was. The difficulty in so locating the beginning becomes manifestly insuperable when we attempt to reverse three lines and run to imaginary points without a given distance to fix their location. There is nothing, therefore, upon the face of the deed which either absolutely locates or points to any extrinsic evidence from which we could ascertain the location of the beginning or any one of the five succeeding corners. The last order made by the Court, which vacated the former order granting a new trial, is reversed, leaving the consent order, setting aside the verdict, in full force.

Reversed.

T. N. WILSON et al. v. D. W. DEWEESE.

Equity in Land Subject to Execution—Administrator's Sale of Land.

1. An allegation in a complaint that one purchased the land in controversy and paid for the same and was entitled to a grant from the State on the payment of the grant fees (where such land is a part of the "Cherokee Lands") is a sufficient declaration that the charges have been paid to the proper officer and that nothing remains to be done but to procure a grant from the Secretary of State in the usual way.

2. One who has purchased lands within the "Cherokee Land" boundary, and has paid for them and is entitled to a grant on payment of the grant fees, has a vested equitable estate therein which is subject to execution.

3. An allegation that "the administrators, in the administration of the estate of deceased, sold certain lands and assigned the certificate of survey," is not a sufficient averment of a sale under lawful authority, but in an action to recover such lands such insufficiency is cured by the allegation that the administrator obtained judgment on the notes given for the purchase of such lands and had the same sold under execution, for, in such case, the law presumes that the Court acted properly in rendering the judgment and will not permit it, or the sale made under it, to be attacked in an indirect and collateral way.

This was a CIVIL ACTION, tried before *Armfield, J.*, at Fall Term, 1893, of the Superior Court of CHEROKEE County.

The defendant demurred to the complaint of the plaintiffs and his Honor sustained the demurrer and gave judgment against the plaintiffs and Jas. C. Axley on their prosecution bond for the costs of the action.

The plaintiffs excepted to the ruling and judgment and appealed to the Supreme Court.

The plaintiffs complained as follows:

"1. That they are owners of the following described entries or tracts of land in District No. 5 of Cherokee county, North Carolina, to-wit (here follows the description).

"2. That they are entitled to the legal title to the same by reason of the facts following, to-wit: One Joseph Wilson, late of said county, but now dead, who was the father of the plaintiffs, T. N. and M. C. Wilson, purchased the said tracts of land and paid for the same and was entitled to the grant from the State of North Carolina on the payment of grant fees for same.

"3. That soon after the death of said Joseph Wilson, in the year ---, C. C. Gentry and T. N. Wilson became administrators of said deceased, and that in their administration of the estate of said deceased they sold the said lands and assigned the certificates of survey and other papers necessary on which to obtain grants from the State to the defendant, D. W. Deweese, and one J. M. Lovinggood; that the said sale embraced other lands as well as the lands herein described and was made on credit to amount of $537.50, for which notes were given; that on failure to pay, as agreed, said administrators obtained judgment against said purchasers, Deweese and Lovinggood, and caused the lands herein described as entries No. 1,297 and No. 2,124 to be sold at execution sale by the Sheriff of said county, at which sale the said C. C. Gentry, administrator aforesaid, bid in the same and took deeds for said lands in his own name, and has, since said sale at execution as aforesaid, conveyed the same to T. N. Wilson, M. C. Wilson, and others, heirs at law of said deceased.

"4. That since the sale of the said land by the Sheriff as aforesaid the defendant, D. W. Deweese, having the said papers on which to obtain grants as aforesaid, has wrongfully and without purchase or consideration other than as aforesaid on the 3d day of May, 1892, procured grants from the State to said lands, tracts No. 1,297 and No. 2,194; that such issue of grants to said defendant and in his name was without the consent and against the will of the plaintiffs, and was greatly to the injury of the plaintiffs.

"5. That, as aforesaid, the plaintiffs are equitable owners and entitled to the legal title to said lands.

"6. That plaintiffs made demand on said defendant for said title papers after the said execution deed and before the grants for the same.

"Wherefore plaintiffs ask the judgment of the Court:

"1. That they be adjudged owners and entitled to the legal title to said lands.

"2. That D. W. Deweese be declared trustee and required to convey same to plaintiffs.

"3. For the costs of the action."

The defendant, for cause of demurrer, alleged:

"1. That it appears on the face of said complaint that the plaintiffs have no right to maintain this action, because said plaintiffs have no interest in said lands, their said interest having been assigned to the defendant and to J. M. Lovinggood for valuable consideration.

"2. That at the time of the alleged sale under execution the defendant had no interest in the lands described in said complaint which was subject to sale under execution."

Messrs. J. W. & R. L. Cooper, for plaintiffs (appellants).

Mr. Edmund B. Norvell, for defendant.

AVERY, J.: The allegation in a complaint that the father of the plaintiffs "purchased the said land (that in controversy) and paid for the same and was entitled to the grant from the State of North Carolina on the payment of the grant fees for the same," where such lands were located within the boundary known as the "Cherokee Lands," is a sufficient declaration that the charges of the State, under the law applicable to that body of land, had been paid to the proper officer, and that nothing remained to be done in order to perfect the title but to procure a grant from the Secretary of State upon exhibiting the proper certificates of survey and paying the commissions allowed that officer for issuing it. The charges for the land having been paid in full, the interest of Joseph Wilson was no longer in the nature of an inchoate equity, but was like that of a vendee holding a bond for title or contract for purchase of land, and who has paid the whole of the stipulated price. *Hinsdale* v. *Thornton*, 75 N. C., 381. Both the interest of the vendee and of the proposed purchaser, who has paid the price agreed upon between himself and the agents of the

State, are liable to sale under execution for precisely the same reason. Each has a right to demand the conveyance of the legal title from the contractor, and each holds a vested equitable estate as distinguished from a mere equitable right. *Hinsdale* v. *Thornton*, *supra.* The fact that some little cost may attend the execution and registration of the deed or grant fails to relegate it either to the class of imperfect, incomplete or inchoate equities. The shades of difference in the details to be looked to in perfecting title are not sufficient to stamp upon one the character of an inchoate and on the other that of a perfect equity or unmixed trust. This question has never, so far as we can discover, been directly decided, but upon "the reason of the thing" there can be no doubt about the correctness of the principle we have stated.

If Joseph Wilson had paid the notes given for the purchase at one of the sales of Cherokee land, as we may infer from the language employed in the complaint, his administrators might treat the interest as a part of his real estate and procure a decree for a sale of it to make assets. They might assign it to the purchaser at the sale made under such decree, and on the failure of such purchaser to pay the price for which he gave his note the interest might, like that of a vendee who has paid all of the purchase-money and upon the same principle, have been sold under execution to satisfy the judgment for the unpaid price. But the allegation that "in the administration of the estate of said deceased they sold the said lands and assigned the certificates of survey" is not a sufficient averment that the sale was made under lawful authority or by virtue of a decree of a competent court, which alone would authorize the intermeddling of administrators with the real estate of a decedent. The statutes which permit personal representatives to sell land under a license to make assets are in derogation of the common law, and the sale of land is not to be treated in pleadings as one of the usual concomitants of the "administration of the estate" of a decedent. Being out of the ordinary course of administration, the allegation should have been, not simply that the administrator sold, but that they sold "by virtue of a decree of a competent Court," or "by lawful authority," or it should ordinarily have been couched in some similar language that would have indicated that they did not attempt to treat the landed interest like a chattel, to be disposed of by personal representatives in the ordinary course of administration. But while it would seem, if nothing more appeared, that the allegation as to the authority to sell was insufficient, and that the action might have been liable to dismissal on demurrer *ore tenus*, the case assumes a different phase when we find further on in the complaint the allegation that the administrators obtained judgment upon the notes given for the purchase-money of the land at the first sale, and sold upon that judgment. The law presumes that the Court acted properly in rendering the judgment, and will not permit it or the sale made under it to be attacked in this indirect and collateral way. *McGlawhorn* v. *Worthington*, 98 N. C., 199. The presumption arises, when the sale on a judgment for the purchase-money is admitted to have been made, that the judgment was valid and rendered upon notes given for the interest at a sale under the proper license.

For the reasons given we think that the Court erred in sustaining the demurrer. The judgment must be reversed. The demurrer should have been overruled and the defendants allowed to answer over upon such terms as the Court saw fit to prescribe. Reversed.

O. V. F. BLYTHE, Administrator of Rachel Gash, deceased, v. THOMAS J. GASH, W. J. HOLDEN, et al.

Homestead—Judgment Lien—When Enforceable.

On March 18, 1876, a judgment was docketed against G. and a homestead allotted on July 31, 1876; she conveyed it to H. December 29, 1881, and died June 2, 1891: *Held*, in a proceeding by G.'s administrator to sell the land for assets to pay the judgment, that the lien of the judgment continued so as to be a charge upon the land and that the administrator was entitled to sell it to pay the judgment and costs of its enforcement.

This was a PROCEEDING, instituted by the plaintiff against T. J. Gash, before the Clerk of the Superior Court of Henderson County. H. R. Holden and W. J. Holden, having made affidavit that they were claimants of the land which plaintiff asked should be subjected to the lien of the judgment, were made parties defendant. The case was certified by the Clerk to the Superior Court, and coming on to be heard by *McIver*, *J.*, at Fall Term, 1892, of HENDERSON Superior Court, it appearing to the Court that there was no personal estate belonging to the plaintiff's intestate, Rachel Gash; that there existed a judgment in favor of Elias, Cohen & Roessler against T. J. Gash and Rachel Gash, said judgment having been duly docketed on the 18th of March, 1876, judgment docket Superior Court Henderson County; that a homestead had been allotted to the said Rachel Gash on the 31st of July, 1876; that the said Rachel Gash had conveyed the said homestead so allotted on the 29th of December, 1881, to G. W. Holden, who had subsequently conveyed same to the defendants H. R. and W. J. Holden, who are now in possession, and his Honor being of the opinion that the only question at issue was "whether the homestead conveyed by R. Gash was subject to the lien of the judgment of Elias, Cohen & Roessler, the homestead estate of R. Gash having terminated," it was therefore ordered, adjudged and decreed that the plaintiff have judgment for the relief prayed for in his complaint, and that O. V. F. Blythe, administrator, be empowered and directed to sell the homestead conveyed by Rachel Gash, and from the proceeds of sale to discharge the lien of the judgment and costs incurred in its enforcement.

Among the defences the defendants alleged that "Rachel Gash, deceased, was only security to the alleged creditors of her son, T. J. Gash, who is and has been for a number of years abundantly solvent and worth the said indebtedness," and that there was ample property of said T. J. Gash within reach of the creditors if they have any valid claim.

The defendants appealed from the judgment rendered.

Mr. H. G. Ewart, for plaintiff.

Messrs. W. A. Smith and *T. J. Rickman*, for defendants (appellants).

PER CURIAM: The very carefully prepared and interesting brief of the defendants' counsel has been fully considered by the Court, but fails to satisfy us that the judgment is barred or that its lien does not continue so as to constitute a charge upon the land described in the complaint. Neither do we think the liability of Mrs. Gash's estate is to be postponed under the circumstances of this case until the proceeds of the property of the alleged surety in the judgment can be followed and subjected. Affirmed.

J. H. HAYES WOOLEN COMPANY v. D. R. McKINNON et al.

(DEFENDANTS' APPEAL).

Claim and Delivery—Right to Possession—Contract—Repudiation—Right to Account.

1. A bill of sale which recited that, in consideration of a sum "paid by W., agent" for plaintiff, a bargainor sold and conveyed a stock of goods, vested the title in the plaintiff and not in the agent, and the former may maintain an action of claim and delivery for the goods.
2. Where plaintiff consigned to defendants a stock of goods, the latter to conduct the business in the name of the former and to account to plaintiff for all proceeds, and plaintiff brought action of claim and delivery: *Held*, that the denial, in defendants' answer, of plaintiff's ownership was a repudiation of the contract and rendered it unnecessary for plaintiff to prove a demand for an accounting and a refusal before bringing action.
3. In claim and delivery by the owner of a stock of goods under a contract with defendants entitling the latter to retain possession and to be revested with the title whenever the net profits paid to the owner should amount to $750, the defendants are entitled to an accounting to ascertain the amount of net profits paid over so that the owner may be charged with the same in adjusting the rights of the parties.

ACTION of claim and delivery, tried before *Armfield, J.*, and a jury, at August Term, 1893, of BUNCOMBE Superior Court.

The following issues were submitted to the jury:

"1. Did the defendants make the written contract set forth in the complaint with the plaintiff? Answer, Yes.

"2. Is the plaintiff the owner of the goods which it claims in the complaint and entitled to the possession thereof? Answer, Yes.

"3. What is the value of said goods? Answer, $794.23.

"4. Has the plaintiff failed to perform its part of said contract made with the defendants? Answer, Yes.

"5. What damage have the defendants sustained by reason of plaintiff's failure to perform said contract? Answer, $300."

The following is the material part of the judgment, from which both parties appealed:

"Now, therefore, it is ordered and adjudged by the Court that the plaintiff do recover from the defendants the goods, chattels and choses in action described in the inventory attached to the complaint in this case, together with the costs of this action.

"It is also adjudged that the defendants upon their counter-claim recover from the plaintiff, the Jos. M. Hayes Woolen Co., the sum of $300 damages for the breach by the plaintiff of the written contract between the parties thereto, as set forth in the complaint."

Mr. James H. Merrimon, for plaintiff.

Mr. Charles A. Moore, for defendants (appellants).

BURWELL, J.: The plaintiff here brings its action for the possession of certain personal property, and has availed itself of the ancillary remedy of "claim and delivery," and under that proceeding the property was taken by the Sheriff and delivered to the plaintiff according to the provision of *The Code*.

In the second paragraph of its complaint the plaintiff says:

"That on the 9th day of April the plaintiff, at Asheville, N. C., was the owner and lawfully possessed of the personal property, the goods and chattels and choses in action, as set forth and described in the annexed inventory, of about $750, then and ever since its property."

This is expressly denied by the defendants in their answer.

In the third paragraph of the complaint it is alleged that on the 9th day of April, 1892, the plaintiff entered into the following contract with the defendants:

"This agreement, made and entered into this 9th day of April, 1892, by and between Robert Winkleman, agent for the Joseph M. Hayes Woolen Company, of St. Louis, Mo., party of the first part, and D. R. McKinnon and H. Petrie, of the county of Buncombe and State of North Carolina, parties of the second part, witnesseth, that the party of the first part, for and in consideration of the sum of ten dollars to him in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, and for the further consideration of the mutual covenants and agreements herein mentioned, has this day consigned to the said parties of the second part all of a certain stock of goods and fixtures now in and belonging in a certain store-house, No. 47 South Main street, Asheville, N. C., and being all the goods by him this day bought from J. McD. Whitson, assignee of McKinnon & Petrie.

"And the parties of the second part agree to hold said goods as the agents of the party of the first part, and to conduct the business, which is a tailoring business, in the name of the party of the first part, and to conduct it in a business-like manner, and to keep a correct account of all receipts and expenditures, and to furnish to the owners, at any time demanded, a correct account of affairs, and to turn over to the party of the first part all funds that come into their hands.

"And the party of the first part agrees to supply from time to time such goods as are necessary to keep said business in operation, and when the parties of the second part have so conducted said business that the net earnings to the party of the first part have amounted to the sum of seven hundred and fifty dollars then the title to all the property remaining in said store-house and connected with said business shall vest immediately in and be the property of the parties of the second part.

"And the party of the first part agrees to let said parties of the second part continue said business in said manner until January 1, 1893, if such a time is found necessary and so desired by the parties of the second part.

"And the parties of the second part do hereby, in consideration of the premises above-mentioned and the further consideration of one dollar to them paid, the receipt of which is hereby acknowledged, sell, transfer and set over all their personal property exemptions and rights thereto, arising out of and connected with the assignment of the parties of the second part to J. McD. Whitson, to the party of the first part, said assignment being dated April 6, 1892, and of record in book 28, in the office of Register of Deeds for Buncombe county, in said State.

"And the parties of the second part agree to keep said property insured in a sum at least equal to seven hundred and fifty dollars, and to have the loss, if any, made payable to the said party of the first part, as his interest may appear and actually be.

"Witness our hands and seals, the day and date first above written.

"D. R. McKinnon, [Seal.]
"H. Petrie, [Seal.]
"Robert Winkleman, [Seal.]

"Witness:
"Wm. H. Lewis."

In answer to this paragraph of the complaint the defendants say: "That the allegations contained in the third paragraph of the complaint are untrue; that, as they are advised and are informed and believe, the said paper-writing, a copy of which they believe is correctly inserted in said third paragraph, was made with one Robert Winkleman, and not with the plaintiff, the Hayes Woolen Co."

The execution of this writing being thus admitted by the defendants, its effect, so far as it related to the ownership of the property described therein, which was conceded to include that which was mentioned in the complaint and which has been seized under the warrant of claim and delivery, was a question of law to be determined by the Court. The defendants in their answer aver that the goods in controversy here were originally a part of the stock of the firm of McKinnon & Petrie, which firm on April 6, 1892, made an assignment to J. McD. Whitson for the benefit of their creditors, of whom the plaintiff was one, reserving to each of said firm his exemptions, and that thereafter the following deed was executed by the assignee:

"STATE OF NORTH CAROLINA—Buncombe County.

"Know all men by these presents that for and in consideration of the sum of $1,500 to me in hand paid by Robert Winkleman, agent for Jos. M. Hayes Woolen Company, of the city of St. Louis, Mo., the receipt whereof is hereby acknowledged, I have this day sold, and do hereby sell and convey, transfer, assign and set over, all and singular, the goods and chattels, notes and accounts, choses in action, and other evidences of debt, together with all the other property described in the deed of assignment executed to me on the 6th day of April, 1892, by D. R. McKinnon and H. Petrie, of the city of Asheville, in the county of Buncombe and State of North Carolina, said goods and chattels being now in the store-house No. 47, on South

Main street, in said city of Asheville, a correct inventory of which is this day given and furnished with this bill of sale.

"In testimony whereof I, J. McD. Whitson, assignee in the said deed of assignment, have hereunto set my hand and seal, this the 9th day of April, 1892.

"J. McD. WHITSON, *Assignee*, [Seal.]

"Witness:
"WM. H. LEWIS."

The earnest contention of the defendants, disclosed by their answer, was that the plaintiff was not the owner of the goods assigned as aforesaid by the trustee Whitson—that that assignment was to Robert Winkleman and not to the plaintiff. We cannot assent to this proposition. The consideration, as stated in the instrument, was "paid by Robert Winkleman, agent," for the plaintiff, and it is clearly indicated by terms of the deed that the title to the goods was to be put thereby in the Jos. M. Hayes Woolen Company, so far as the trustee could transfer it. Only one other thing was needed, as we think, to make the plaintiff's title complete on that day, and that was that the defendants' claims for exemptions out of the stock should be adjusted. And this was done by the contract heretofore set out, the execution of which the defendants admit, by which they did "sell, transfer and set over all their personal property exemptions and rights thereto" which they had reserved under their assignment to Whitson. That contract was made by the defendants with the plaintiff through its agent, Robert Winkleman. There is nothing about it to show that Winkleman individually had any part or lot in it. It was plainly expressed in it that he was acting for the plaintiff. All the surrounding circumstances showed that the defendants so regarded him and so contracted with him. The fact that he signed merely "Robert Winkleman [Seal]" to the instrument has no importance. The defendants executed that contract and thereby distinctly recognized the plaintiff as the owner of the goods and agreed to hold them as the plaintiff's consignees or agents according to the terms of that writing.

His Honor did not err, therefore, when he told the jury to find the first fact involved in the second issue, to-wit, the plaintiff's ownership of the goods, in its favor. That issue involved another fact, to-wit, the plaintiff's right to the possession of the goods.

According to the provisions of the contract the defendants were to have possession of the goods, with a right to dispose of them in the regular usual course of the business, until January 1, 1893. This suit was brought before that time had expired. Had the defendants forfeited their right to hold and use the goods under that contract? We think so. Their right to the possession of the property was conditioned upon their continued performance of those duties to the plaintiff which they stipulated in the contract that they would do. Such is the reasonable and proper construction of that agreement. There was to be a constant recognition of the plaintiff's ownership. The business was to be conducted in its name. They expressly agreed that they would "keep a correct account of all receipts and expenditures" and furnish to the owners at any time demanded a correct account of affairs and turn over to the party of the first part, the plaintiff, all funds that came to their hands. Now, the averments of the answer, independent of any evidence, are themselves sufficient to entitle the plaintiff to assert a right of possession of the goods. In that answer the defendants distinctly deny that the plaintiff is or was the owner of the goods. This was, of course, equivalent to a repudiation of all their obligations to the plaintiff growing out of that contract. No proof of a demand for an account and a refusal was necessary. *Wiley* v. *Logan*, 95 N. C., 358. The title having been shown to be in the plaintiff, as above stated, his Honor might well have held that the declarations of the defendants in their answer showed that the plaintiff had a right to take possession of the goods. Thus it was properly determined that the plaintiff was not only the owner but was entitled to the immediate possession of the goods described in the complaint.

We do not deem it necessary, in the view we take of the case, to consider *seriatim* the objection to the admissions of evidence and to the charge of his Honor so far as these exceptions relate to the first and second issues, for, as we have said, those issues should have been answered in the affirmative upon the pleadings and the writings put in evidence by the parties.

The "case" on the defendants' appeal contains the following statement:

"The jury returned their verdict as appears in the record, when the defendants moved, in writing, that an issue be submitted to the jury or an account be taken to ascertain what credits the defendants are entitled to upon the $750, balance due to the plaintiff, and that they be permitted to pay the same if the goods could be re-delivered to them, and if they could not be re-delivered to them that the plaintiff be adjudged to pay to them the difference between the amount due, after deducting credits so ascertained, and the value of said goods as settled by the jury. The written motion in the record is to go as part of this case to the Supreme Court. This motion was refused by the Court, and the defendants excepted. The judgment appearing in the record was then rendered, and the defendants excepted."

An account should have been ordered. The allegations of the complaint itself showed what was in effect an agreement by plaintiff to sell the goods to the defendants for the sum of $750. The controversy is here *inter partes.* It matters not whether the writing be called a mortgage or a contract of sale. The legal effect of it was to put the title to the goods in the plaintiff subject to defendants' right to pay for them and thus acquire title to them. The rights of the parties may be adjusted in this action. *Austin* v. *Secrest*, 91 N. C., 214. In such accounting the goods taken by this action should be valued at $794.25, as found by the jury, and it should also be charged with such sum as it has collected.

Error.

PLAINTIFF'S APPEAL IN SAME CASE.

BURWELL, J.: After a careful examination of the defendants' answer we find no allegations upon which, as it appears to us, the fourth and fifth issues can be properly supported. Throughout that pleading there is a persistent denial that there was any contract between them and the plaintiff. It would be hard measure, indeed, to allow the plaintiff to be mulct in damages at defendants' instance for not doing what the defendants themselves insisted the plaintiff was not bound to do. These two issues and the findings thereon should be stricken out. In this appeal there is error. The judgment in this cause will be set aside and an order for an account will be made.

E. B. ATKINSON et al. v. E. EVERETT, Administrator of Clarke Whittier, et al.

Injunction—Trust Deed—Stipulation in Notes as to Non-assignability—Liens.

Where an administrator sold land, taking grantees' notes for balance of purchase-money, containing a stipulation that they were not payable or transferable until all liens and liabilities on and against the lands should be discharged, and such notes were secured by a deed of trust under which the trustee was preparing to foreclose, and vendees sought an injunction upon the ground that there were various claimants for parts of the land and suits pending for one-sixth of it, to which the administrator replied that those matters had been passed upon by the vendees' attorney and that the vendees bought with full knowledge of the pending suits and conflicting claims and that the stipulation in the notes referred only to judgments against decedent's estate, which had since been paid, and to the balance of a mortgage debt due by decedent's estate, which would be paid out of the money to be paid by plaintiffs (the vendees): *Held*, that it was proper to continue the injunction to the hearing.

ACTION brought by E. B. Atkinson and others to restrain defendant administrator and others from selling land under a deed of trust, heard before *McIver, J.*, at BUNCOMBE Superior Court.

From an order continuing the injunction to the hearing the defendants appealed.

The affidavit of plaintiff E. B. Atkinson, which was supported by affidavits of C. E. Graham and others similar in substance, was as follows:

"1. That about the year 1885 R. V. Welch and the heirs of J. R. Love, and perhaps others interested, conveyed to the late Clarke Whittier a large tract of land containing about from 75,000 to 80,000 acres, lying in Swain county on the north side of the Western North Carolina Railroad, and on the north side of the Tuckaseigee river, and now commonly known as the Whittier lands, at the price of $50,000, of which sum, as affiant is informed and believes, $10,000 was paid at the time of said conveyance, and the remainder secured by a deed of trust executed by said Clarke Whittier to W. L. Hilliard, conveying the said lands to said Hilliard as trustee in trust to secure the payment of the remainder of said purchase-money. That since said first above-mentioned conveyance, as affiant is informed and believes, various amounts have been paid upon said remainder of said purchase-money until the balance now due thereon does not exceed the sum of $15,000. That said trustee, Hilliard, died on or about the 11th day of October, 1890, and the defendant W. A. Gibson has been duly appointed trustee in his place. That on or about the 17th day of May, 1887, the said Clarke Whittier died, leaving a last will and testament, which has been duly admitted to probate in said county of Swain, and the defendant E. Everett, on the 7th day of October, 1889, was duly appointed administrator *cum testamento annexo* of said Whittier.

"2. That on or about the 2d day of August, 1890, the said defendant Everett, as by said will he was duly authorized to do, conveyed the lands hereinbefore described to Natt Atkinson, C. E. Graham and J. M. Thrash for the price of $40,000. That of this sum $8,000 was paid to said Everett on or about the 2d day of August, 1890, and the said Natt Atkinson, C. E. Graham and J. M. Thrash executed their promissory notes under seal to said Everett for $32,000, copies of which are hereto annexed, except one note for $6,000 which was not embodied in deed of trust to Fry, and to secure the payment of the same conveyed said lands to A. M. Fry, trustee, in trust to sell said lands under certain conditions named in said trust deed. That of the said sum of $40,000 there is still due said Everett about the sum of $16,000, with some interest, upon the conditions hereinafter mentioned.

"3. That on or about the 15th day of August, 1890, the said Natt Atkinson, C. E. Graham and J. M. Thrash sold to B. L. Duke an undivided fourth interest, for which said Duke has paid about $23,400, and since said sale to said Duke said Natt Atkinson has conveyed the remainder of his interest in said land to E. B. Atkinson and C. B. Atkinson, two of the plaintiffs above named, and the said C. E. Graham has conveyed his interest in said land to the plaintiff M. S. Ray, wife of the plaintiff J. E. Ray.

"4. That since the conveyance to said Duke he has made an assignment, as affiant is informed and believes, of all his property, including his interest in said land, to the plaintiffs V. Ballard and J. F. Wiley, as his assignees.

"5. That the plaintiffs are the owners in fee-simple of said lands, subject to liens for unpaid purchase-money, provided the titles of those who conveyed the same to said Clarke Whittier were not defective. That, as affiant is informed and believes, the vendors of said Clarke Whittier did not have or convey to said Whittier a good and indefeasible title to all of said lands, but, on the contrary, there are large parcels of the same held and claimed by other persons under grant from the State and mesne conveyances.

"6. That, as affiant is informed and believes, there is now an action pending in the county of Swain, or in the Supreme Court, between the heirs of one Allison as plaintiffs and R. V. Welch and the heirs of said Clarke Whittier as defendants, wherein said plaintiffs claim to be the owners of an undivided sixth interest in the whole of said lands.

"7. That by express stipulation in the notes executed by said Natt Atkinson, C. E. Graham and J. M. Thrash to the defendant E. Everett, administrator of said Clarke Whittier, said notes were not transferable or payable until all liens and liabilities on or against the land are paid and discharged; but, notwithstanding said express stipulation, the defendant A. M. Fry, trustee in the deed of trust of said land, to secure said notes, professing to act under the power conferred on him by said deed, but in flagrant violation of said stipulation contained in said notes, has advertised said land for sale to pay said notes, and threatens and intends, unless restrained, to sell the same at the court-house in said county of Swain, on or about the 31st day of January instant; that said Fry is acting in concert with his confederates, Everett and Gibson and Welch, as affiant is informed and believes; that each of these defendants know that all liens and liabilities on said lands have not been paid or discharged, and also know the title to such of said lands is in dispute, and cannot be settled until after protracted litigation; that affiant is informed and believes that the defendant Welsh has threatened that if the defendants Everett and Fry shall be restrained from selling said lands he will have the same advertised and sold under the deed of trust from Clarke Whittier to W. L. Hilliard by the defendant Gibson, who has been appointed trustee in the place of Hilliard.

"Affiant further swears that the heirs of Clarke Whittier all reside beyond the limits of the State, and if said Everett, administrator, is permitted to collect said purchase-money and pay the same or any part thereof to said Whittier heirs, these plaintiffs will not be able to recover back the same without great trouble and expense, and perhaps not at all, for affiant does know that said Whittier heirs or any of them are solvent.

"8. Affiant is informed and believes there exists an agreement between the defendant Everett and those entitled to receive the remainder of the purchase-money from the estate of said Clarke Whittier that only the interest shall be required to be paid until all claims and encumbrances shall be removed from said lands, now that a sum sufficient has been paid to said Everett to pay said interest.

"Affiant adds that, as he is informed and believes, there are several thousand acres of said lands, lying near the center of the north-west end of the tract, claimed by the Foster heirs, and known as the Foster grant, which the plaintiffs will not probably be able to hold. At all events, as affiant believes, the claim of said Foster heirs will be litigated, and considerable time and expense will be required to procure a settlement of the dispute.

"The plaintiffs have commenced an action against the defendants for an injunction, etc. The plaintiffs pray that the defendants, their agents, servants and employees, be restrained and enjoined from selling said lands, and for such other relief as the facts of the case may entitle them to have."

The stipulation or condition contained in the notes was as follows:

"But this note is not payable or transferable until all liens and liabilities on and against the lands in Swain county, N. C., known as the 'Whittier Lands' are paid or discharged."

E. Everett, one of the above-named defendants, being duly sworn, deposes and says:

"1. That he is informed and believes that paragraph 1 of the affidavit filed by E. B. Atkinson is true, except that there is not more than the sum of $14,000 due on these notes secured by deed of trust executed by Clarke Whittier to W. L. Hilliard, trustee.

"2. That paragraph 2 of the said affidavit is true, except that there is due this affiant the sum of $19,562.66, with interest to March 15, 1894, as administrator of Clarke Whittier, including principal and interest, but there is nor has been no dispute between this affiant and plaintiffs as to the amount remaining unpaid on said notes.

"3. That as to paragraph 3 of said affidavit this affiant has not any knowledge or information sufficient to form a belief."

For further answer to said affidavit this affiant says: "That he sold what is known as the 50,000-acre Whittier tract of land to Natt Atkinson, C. E. Graham and J. M. Thrash at a greatly reduced price, to-wit, $40,000, because the same was then advertised for sale by virtue of a power contained in deed of trust executed by Dr. Whittier to W. L. Hilliard, trustee, to secure the purchase-money; that said sale was a sale in gross of the lands described in the deed executed by this affiant and was not a sale by the acre; that this affiant cannot speak of his own knowledge as to the Foster claims, but he is informed and believes that Capt. M. E. Carter, after a thorough investigation of the title to the Whittier lands, made an abstract of same, and in said abstract stated that 'evidently Foster and those who have purchased from him have been advised that inasmuch as his entries were junior to our entry, he or they would be declared mere trustees of the legal title for the benefit of the present owners, should they ever attempt to make any claim'; that the plaintiffs and those under whom they claim have been in possession of large portions of the Whittier tract, and this affiant is informed and believes that there has been no adverse possession under the Foster claims, and the plaintiffs have not been evicted or disturbed in their possession; that at the time of the sale of said land by this affiant to said Graham, Atkinson and Thrash a suit on the Allison claim was then pending in the Superior Court of Swain County and said vendees had full notice, both actual and constructive, of said claim; that the validity of said claim was fully discussed at the time of said sale, and Capt. M. E. Carter, the legal adviser of said vendees, advised them that they need not fear the Allison claims as there was nothing in it; * * * that it was the true intent of the conditions in the notes referred to in the affidavit for plaintiffs that the money should be first applied to the payment of the purchase-money deed of trust to W. L. Hilliard, trustee, and any judgments that were a lien on the land, and never contemplated the Allison claim, or a defective title, or defect in the quantity of land, and a copy of the deed of trust under which the defendants were proceeding to sell is hereto attached and marked Exhibit 'A'; that at the time of said sale to plaintiffs there were several judgments docketed which were a charge on the estate of the said Clarke Whittier, deceased, but the same were fully satisfied before the land was advertised for sale and before this action was brought; that at the last term of the Superior Court of Swain County, on the trial of the action brought on the Allison claim (which motion is now pending in the Superior Court), the following issue was submitted to the jury: 'Are plaintiffs the owners and entitled to the possession of an undivided sixth part of the 50,000-acre tract?' and said issue was answered 'No'; that in the deed from R. V. Welch and others to Clarke Whittier for land described in plaintiffs' affidavit there were full covenants of seizin, general warranty, etc.; that said grantors are solvent, and especially R. V. Welch, who is a resident of this State and amply able to answer on his covenants for any defect of title; that said affiant has no knowledge or information sufficient to form a belief as to the threats of Welch to advertise said land as spoken of in plaintiffs' affidavit; that this affiant has no intention of paying any of the proceeds of the sale to the devisees or legatees of Clarke Whittier until all liabilities against the estate and matters in dispute are settled; that the deed of trust, as this affiant is advised and believes, makes it the duty of A. M. Fry, the trustee, to see that enough of the proceeds of a sale should be applied to the satisfaction of the deed of trust executed to W. L. Hilliard, trustee, and any judgments, liens, if there were any; that if said W. L. Hilliard deed of trust was satisfied out of the amount due this affiant by vendees, there would still be due the estate of Clarke Whittier a considerable amount, which is necessary to the proper administration of said estate; that the amount due from plaintiffs is the only available fund with which to pay the Hilliard trust deed and to pay the costs of administration, as the balance of the estate consists mostly of mountain lands for which there is no present sale, and it would be a great hardship to this affiant to deprive him of the only means by the aid of which he can perform the conditions in the deed of trust hereto attached: that is to say, the payment of the Welch and Hilliard liens, and also to deprive him of the balance due the estate after satisfying the said liens; that there are several pressing debts due from the estate, and the amount due from the plaintiffs is necessary to discharge same, as the other assets of the estate cannot easily be rendered available for such a purpose without a great sacrifice; that the estate of Clarke Whittier is solvent, and affiant is informed and believes that the devisees and legatees of said Whittier are entirely solvent; that this affiant is advised and believes that the title to the Whittier lands sold to aforesaid vendees, Graham, Atkinson and Thrash, is good and indefeasible, but if there are any defects in said title they were known to the said vendees when they purchased, and that the condition of said title has in no way changed since said purchase by said vendees; that this affiant is informed and believes that said vendees caused the title to said lands to be examined by counsel learned in the law, to-wit, Capt. M. E. Carter, before they bought same, and that if there were any defects in said title they were fully advised of same before purchasing as aforesaid."

Mr. James H. Merrimon, for plaintiffs.

Messrs. Fry & Newby and *W. W. Jones*, for defendants (appellants).

PER CURIAM: There seems to us to have been no error in continuing the injunction to the hearing. *Whitaker* v. *Hill*, 96 N. C., 2, and the numerous cases that have affirmed that decision apply to this appeal.

No Error. Affirmed.

E. W. GREER v. CITY OF ASHEVILLE.

Statute Retroactive—Officer of City—Term of Office, how affected by amendment to charter of city—Appointment.

1. A statute operates prospectively only and never retroactively unless the legislative intent to the contrary is made manifest either by the express terms of the statute or by necessary implication.
2. An amendment to the charter of a city providing that the City Marshal shall hold office during good behavior does not have the effect of enlarging the term of office of one who was previously elected to hold during the term of the aldermen.
3. The term of office of a City Marshal appointed under a charter providing that marshals should hold office during the official term of the aldermen is not enlarged from one to two years by an amendment to the charter extending the term of the aldermen from one to two years.

4. The requirement of a city charter that the aldermen shall appoint a marshal at their first meeting after their election is merely directory and their failure to make the appointment at the first meeting does not invalidate an appointment made at their second meeting.

APPLICATION for *mandamus*, heard before *Armfield, J.*, at August Term, 1893, of BUNCOMBE Superior Court.

It being agreed by all parties thereto that the Court should find the facts and pass on the same without the intervention of a jury, his Honor found the following facts, to-wit:

"1. That the defendant, The City of Asheville, is a municipal corporation, chartered by an act of the General Assembly of North Carolina and certain acts amending the same, all of said acts being hereby made a part of these findings of fact.

"2. That on the third day of February, 1893, the plaintiff was duly elected a marshal of said city by virtue of the authority conferred by the charter of said city, and that he was duly qualified and entered upon the discharge of his duties as such marshal, and continued to so discharge them till the third day of June, 1893.

"3. That on the fourth day of March, 1893, the General Assembly of North Carolina passed an act amending the charter of the said city of Asheville, chapter 267, Private Laws of 1893, and which is hereby made a part of these findings of fact.

"4. That on the first Monday in May, 1893, T. W. Patton was elected Mayor of the city of Asheville, and W. W. Jones, J. M. Westall, B. H. Cosby and H. Lamar Gudger were elected aldermen of said city, and were duly qualified as such and entered on the discharge of their duties as such on the third Monday in May, 1893, and in connection with J. M. Gudger and T. C. Starnes, who were elected on the first Monday in May, 1891, and whose term of office did not expire till May, 1895, constituted the Mayor and Board of Aldermen of the city of Asheville, all defendants in this cause.

"5. That said Board of Aldermen did not elect any marshals at their first meeting after their election and qualification, but did elect certain marshals on the second day of June, 1893.

"6. That after the said election of marshals on the second day of June, 1893, E. W. Greer was notified that he was no longer a marshal of said city, and his services as such when tendered were refused by the city authorities and he was not permitted to exercise the duties of said office after the said second day of June, 1893.

"7. That the plaintiff insists that he has the right to enjoy and exercise the duties, emoluments, etc., appertaining to said office, first, because the official term of the aldermen in office when he was elected, to-wit, J. M. Gudger and T. C. Starnes, had not expired, and that he was entitled to hold said office during their official term of office; second, that by the act passed by the General Assembly on March 4, 1893, the office of marshal was holdable during good behavior, and became operative from its ratification, and that he could not be deprived of said office except for the causes set forth in said act, and that no such causes were shown as not to entitle him to hold the said office; third, that no marshals were elected at the first meeting of the Board of Aldermen after the third Monday in May, 1893, and that the aforesaid act passed March 4th would confer upon him the right to said office as therein set out."

The Court held that the act did not apply to marshals holding office at the time of the passage thereof; that the official term of the aldermen meant till the next regular election after which they had been elected, and that the failure to elect at the first meeting after the qualification of the new members of the Board, on the third Monday in May, 1893, did not prevent the election of marshals at another time, and refused to grant the *mandamus* prayed for. To all of which the plaintiff excepted and appealed.

Mr. James H. Merrimon, for plaintiff (appellant).
Messrs. W. W. Jones and *F. A. Sondley*, for defendant.

AVERY, J.: Unless the legislative intent to the contrary is made manifest either by the express terms of the statute or by necessary implication arising out of it, it will, as a rule, be held to operate prospectively only—never retroactively. *Lowe* v. *Harris*, 112 N. C., 489; Endlich Inst. Stat., sects. 271 and 274; Sedgewick Stat. and Const. Law, p. 199; Southerland on Stat. Const., sec. 406; Endlich, *supra*, 271 and 525. There is no fact found in this case which takes it out of the general rule since the amendment to the charter was intended to affect the tenure of office not to alter the rules of evidence or procedure or to take effect remedially by arresting the pernicious consequences of enforcing an existing law.

An act of the Legislature passed after the plaintiff was inducted into office was not presumptively intended to enlarge, diminish, or in any way affect his term of office, if his tenure was definitely fixed at the date of its passage, and there is no intimation that can be fairly construed as indicating a purpose to do either. A law should be so interpreted, if possible, as to give effect to all of its provisions, and thereby carry out every object that was within the contemplation of the Legislature, if the different provisions can be so harmonized as to attain that end. Endlich, *supra*, sec. 294.

Section 20, ch. 111, Laws of 1883, provided that the marshals thereafter elected should "respectively hold their offices during the official term of the aldermen, subject, however, to be removed at any time for misbehavior or neglect of duties." We think that the charter, before it was last amended by chapter 267, Private Laws 1893, was properly construed to fix the term of the marshal as expiring after the regular elections of aldermen. The requirement that the aldermen should elect marshals at the first meeting after their own qualification was plainly directory, and the election of the plaintiff's successor was none the less valid because it was postponed till their second session. It was not intended that the omission of the aldermen to discharge, at the prescribed moment, a duty devolved upon them by the charter should be held to tie their hands so as to prevent them from exercising their best judgment in the selection of suitable marshals for the city. It seems, however, that under the provisions of an amendment to the charter (Laws 1885, ch. 128) the aldermen hold for two years, three only of the six being elected at each annual election. When the act was passed, which fixed the terms of the marshals as expiring with "the official term of the aldermen," the aldermen were all elected for one year only (Private Laws 1883, ch. 111, sec. 20), and the amendment of 1885 cannot be fairly interpreted as extending the term of a marshal so as to make it conform to that of the aldermen holding for two years, instead of leaving him, as before, to hold only for one year. The intention of the Legislature was evidently to elect aldermen in two classes, nothing more; and if there had been any purpose to change the tenure of the office of marshal it would have been more explicitly declared. When it became desirable that they should hold during good behavior it was so provided in unequivocal terms by the Act of 1893, which was passed too late to affect the status of the plaintiff. The judgment of the Court below is Affirmed.

*D. S. RUSSELL et al. v. A. J. LEATHERWOOD et al.

Highways—Public Roads—Proceedings to Establish Jurisdiction—Incomplete Statute.

1. Ch. 354, Acts of 1891, providing for working the highways of certain counties and amending the general law as affecting them, empowers "the Board of Township Trustees and the Board of County Commissioners, as hereinafter set forth in this chapter," to lay out public roads, and repeals all inconsistent laws, but does not designate how the joint authority is to be exercised: *Held*, that the provision for the concurrent authority is inoperative and the procedure afforded by section 2038 *et seq.* of *The Code* gives jurisdiction to the County Commissioners to lay out roads in such counties without the co-operation of the Township Trustees.
2. Where, on appeal from the order of the County Commissioners establishing a public road, the Court read the petition to the jury and charged that the termini of the road were as set out in the petition, it was not error to refuse further instructions as to the points named as termini.

This was an APPEAL by A. J. Leatherwood from an order of the County Commissioners of Cherokee county laying out a public road which the petitioners sought to have established, heard before *Graves, J.*, and a jury, at July Special Term, 1893, of CHEROKEE Superior Court.

Before impaneling a jury the defendant, by counsel, moved the Court to dismiss the petition, because the petition, as was shown by the petition itself and the records and orders of the Board of County Commissioners, had never been acted upon by the Board of Township Trustees for Valley Town Township (this being the township in which the road was proposed to be built), as provided by chapter 354, section 1, Laws 1891, but only by the Board of County Commissioners of Cherokee county, on the ground that the County Commissioners alone did not have power to act.

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*BURWELL, J., did not sit on the hearing of this case.

The Court refused to dismiss the petition, and defendants excepted.

The issues submitted to the jury and their responses were as follows:

"1. Is the road, as laid out by the jury, a public necessity, and is the same, as laid out, the most practicable route between the points named? Answer, Yes.

"2. What damage is Leatherwood entitled to by reason of the same? Answer, $200."

In the course of the development of defendants' evidence defendants proposed to show that a different route than the one laid out by the jury between the mountain road beyond the brick house was more practicable than said route, and more practicable than the route set forth in the petition, when counsel for petitioners objected, and proposed to confine defendants in the evidence to the points, to-wit, "the depot at Andrews and the mouth of the lane." The Court overruled the objection and allowed defendants to develop the evidence tending to show that there was a more practicable route than the one set forth in the petition and the one laid out by the jury, and did show, by evidence, a different route which it could be located on.

The counsel for petitioners, closing the argument to the jury, insisted to the jury that "the depot at Andrews and the mouth of the lane" were the objective points set forth in the petition.

Defendants objected to counsel construing the petition, and asked the Court to charge the jury "that the two points designated in the petition are 'the depot at Andrews and the foot of the mountain road leading from Graham county, and beyond the brick house,' and not 'between the depot at Andrews and the mouth of the lane,' and you are to consider the practicability of the route as between 'the depot at Andrews and the foot of the mountain road leading from Graham county, beyond the brick house,' and not confine yourselves to the route between the 'depot and the mouth of the lane.'"

His Honor refused to give the charge, but read the petition, and, instead, said to the jury, "The termini are as set out in this petition."

Defendants excepted, and from the judgment rendered for the petitioners on the verdict the defendant Leatherwood appealed.

Messrs. J. W. & R. L. Cooper, for plaintiffs.
Mr. Edmund B. Norvell, for defendant (appellant).

MacRae, J.: By the Act of 1891, chapter 354, entitled "An act to provide for working the public roads and highways of Clay and other counties," the general law of the State, chapter 50, Vol. I of *The Code*, was amended in several material particulars as far as the same was applicable to the five counties lying in the extreme western part of the State, Cherokee being one of said counties. It was provided in section 2014 of *The Code*, which is the first section in chapter 50, that the Justices of the Peace in each township should have the supervision and control of the public roads in their respective townships under the name of the Board of Supervisors of Public Roads. And it was further provided that "the Board of County Commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries, to order the laying out of public roads where necessary," etc., etc. It was also provided in section 2023 that "the Board of Supervisors shall have the right to lay out and discontinue cart-ways, and the Board of Commissioners of the county only shall have the right to lay out and establish and discontinue public roads."

The Act of 1891, first above referred to, provides that "the Justices of the Peace in each township shall have the supervision and control of the public roads in their respective townships; they are hereby incorporated, and the Board of Trustees of such township shall be their corporate name; they shall have the right to sue and be sued, plead and be impleaded in any of the courts of this State. The Board of Township Trustees and the Board of County Commissioners, *as hereinafter set forth in this chapter*, shall have full power and authority within their respective counties to appoint and settle ferries and to order the laying out and repairing of public roads where necessay," etc. It is not provided or set forth, however, in said chapter how the joint authority is to be exercised with regard to the laying off of public roads, although the power and authority are expressed to be given "as hereinafter set forth in this chapter."

The law with regard to the establishment of public roads providing a system, beginning with a petition to the Board of County Commissioners and with notice to parties interested, opportunity of hearing and of appeal, is set out in sections 2038, 2039 and 2040 of *The Code*. The proceeding is to be instituted before the Board of County Commissioners and carried on before them, and from their action lies an appeal to the Superior Court.

The petitioners in the present proceeding filed their petition with the Board of Commissioners and the usual orders were made by the Board without the co-operation of the Township Trustees, and all of the proceedings were regular under the general law. The appellant contends that the Board of Commissioners had no jurisdiction to determine the matter in the absence of the Township Trustees, and moves here to dismiss for want of jurisdiction.

The right to open public roads through the lands of the citizen, founded upon the necessities of the people and their convenience, is one to be exercised strictly within the bounds of the statute conferring such authority, because it involves the principle of eminent domain, the taking of private property upon just compensation for the use and benefit of the general public. A well-digested system for the laying out of public roads has long been in operation in this State, in which is provided by law a regular procedure before the County Commissioners upon petition duly advertised, with the opportunity to all persons over whose lands the proposed road is to be opened to be heard and to appeal, and to have compensation in case it is finally adjudged to be a public necessity that such road should be opened. Special acts have also been passed for the benefit of certain counties, providing special procedures within their limits for the purposes indicated with regard to the public highways, differing from those provided in the general law, and these acts in some instances have proved highly beneficial, and no question can be made of the power of the Legislature to enact these special laws. In the Act of 1891 such special provision was made for the county of Cherokee and four other counties, and this act has been modified as to some and repealed as to others of the said counties. Indeed, by the Act of 1893, entitled "An act for the better working of the public roads of Cherokee county," much of the Act of 1891 has been repealed and a new system adopted, but we have been unable to find any change in the act last named with regard to the opening of new roads within that county. At any rate the said act was in force at the time these proceedings were instituted and the road named therein was laid off. We are confronted by the fact that while this authority to open public roads, theretofore delegated exclusively to the County Commissioners, was given to the Township Trustees *and* the County Commissioners, it was expressed in terms that such power and authority was to be "as hereinafter set forth in this chapter," and that there is no further direction in said chapter of the mode in which such power should be exercised. It was plainly, then, the intention of the Legislature to provide such method; if it had been expressed, the further provision in section 28 repealing all laws in conflict with this act would make the new the exclusive mode of laying out new roads in said county. But there is no conflict between the old law and the new act as they now stand. There is an evident defect or omission in this respect in the Act of 1891. While without doubt a clerical error may be read as amended, or words may even be transposed in the interpretation of a statute, in order to reach the clear intention of the Legislature, there is no warrant to the Courts to supply apparent omissions, although the result may be to render the act inoperative. "So an act which authorized municipalities, according to a procedure therein described, to open and widen streets, and prescribed a procedure for the opening but none for the widening of the same, was held to that extent inoperative." Endlich on Statutes, sec. 22; Chaffee's Appeal, 56 Mich., 244; Southerland on Stat. Con., secs. 431 and 432. If the legislative intent was not plainly expressed to give this joint authority to be exercised as hereinafter set forth it might be that the jurisdiction of the two bodies would be held to be concurrent; but as we have seen it is such jurisdiction as in its nature cannot be exercised without a statutory procedure, which procedure is already afforded to the County Commissioners by the general law as already cited, and not given, as it was intended to be, to the Township Trustees, or to the two Boards jointly. We must conclude, therefore, that the provision of the act is inoperative, and that the petitioners have pursued the course provided by law to effect their object. The motion to dismiss for want of jurisdiction was the point principally relied upon by the appellant. The other exception was to the refusal of his Honor to instruct the jury as to the points designated in the petition. We can see no force in this exception. His Honor read the petition itself to the jury, and told them that the termini are as set out in this petition.

No Error.

W. L. MYERS v. WILLIAM STAFFORD et al.

Dissenting opinion of Associate Justice CLARK (*filed after the case reported on page 234 of this volume was printed*).

CLARK, J.: I concur in the result, but dissent from so much of the opinion as holds that bastardy is a criminal action. The ten-dollar penalty, even if held to be a fine, pure and simple, and not a fiscal regulation, would be simply one criminal feature added to this anomalous proceeding, which has been often held to have both criminal and civil features, but to be, notwithstanding, purely a police regulation. *State* v. *Edwards*, 110 N. C., 511. I will merely add to what was said in the concurring opinion in *State* v. *Burton*, 113 N. C., 664, this consideration: that if the proceeding is now a criminal action it is difficult to see why the woman is not equally guilty with the man. If it is a crime she is a participant. To make it a crime merely makes it a substitute for the offence of fornication and adultery, but punishing the man alone. This, too, loses sight of the entire object of this law, which is a civil regulation to provide for the support of the child and protect the county from liability therefor. I cannot think that by incidentally providing for a revenue of ten dollars to the school fund (probably in view of the fact that the child will require education from the public schools) the whole nature of the procedure is made criminal, though the accessory and participant, the woman, is not made indictable. The statute certainly does not contemplate she should be, yet why is she not if she is present aiding and abetting in what is now held to be a criminal offence?

WELLINGTON & POWELLSVILLE RAILROAD COMPANY v. THE CASHIE & CHOWAN RAILROAD AND LUMBER COMPANY.

Corporations—Right of Way—Eminent Domain—Collateral Attack of Corporation.

The existence of a railroad corporation cannot be attacked or questioned in an action brought by it to condemn land for its purposes.

PROCEEDING for the condemnation of right of way for a railroad over defendant's land—the area of the land sought to be condemned being about eleven acres—heard on affidavits and on the application of the defendant for injunction, etc., before *Bynum, J.*, at Chambers at Newbern on the 6th December, 1893.

The defendant alleged that the plaintiff, instead of being incorporated for the purpose of becoming a public common carrier, was a purely private corporation and formed as a subterfuge and for the purpose of evading the result of a litigation pending between the defendant and the Branning

Manufacturing Company, which had been restrained from entering upon the lands of the defendant and whose officers etc., were the same as those of plaintiff corporation. The plaintiff acknowledged in the affidavits of its officers that it was incorporated in the interest of the Branning Manufacturing Company, which owned lands which could only be reached by traversing the lands of the defendant, but that it was a *bona fide* railroad corporation, formed for the purpose of not only hauling the lumber of the Branning Manufacturing Company, but also of other companies and individuals, who could not get their lumber to market except across the defendant's land, as well as for the purposes of general transportation and traffic.

Upon considering the affidavits of the parties his Honor adjudged that the defendant was not entitled to the injunction, and refused it, dissolving the restraining order theretofore issued upon the plaintiff's filing with the Clerk of the Superior Court of Bertie County a bond in the sum of one thousand dollars ($1,000) conditioned to pay to the defendant such damages as it might recover in this action, the solvency of said bond to be approved by said Clerk.

From this order dissolving the restraining order plaintiff appealed.

Messrs. R. B. Peebles and *Battle & Mordecai*, for plaintiff.
Mr. F. D. Winston, for defendant (appellant).

PER CURIAM: Upon a consideration of the affidavits filed we are of the opinion that the order of his Honor should not be disturbed. It may also be observed that the existence of the corporation cannot be assailed in this collateral manner (*Asheville Div.* v. *Aston*, 92 N. C., 578), and that the amount of land sought to be condemned does not appear to be unreasonable. The very granting of a charter like this implies that land is necessary to be taken for the right of way, and, unless the discretion is abused, the Courts will not interfere. *Railroad* v. *Railroad*, 106 N. C., 23.

Affirmed.

MARTHA A. LIVERMAN v. ROANOKE & TAR RIVER RAILROAD COMPANY.

Action for Damages — Eminent Domain — Injury to Lands Adjoining Lands Sought to be Condemned — Damages Recoverable by Grantee of Lands.

1. Where the enjoyment of an easement by a railroad in the lands of a land-owner has the effect of injuring adjoining lands of the owner damages are recoverable for such injury.
2. In condemnation proceedings there can be no recovery of damages incident to the entry—such as for destruction of crops and the like—nor for use and occupation before plaintiff acquired title, for these are personal to the owner and do not pass to the grantee.

ACTION for damages to land, tried at November Special Term, 1893, of BERTIE Superior Court, before *Bynum, J.*

The facts of the case appear in the report of the former appeal (109 N. C., 52). Upon the filing of the certificate of the Supreme Court commissioners were appointed to assess damages sustained by plaintiff, and at May Term, 1893, of Bertie Superior Court, the Court being of opinion that the plaintiff was entitled to a jury trial, it was ordered that the case be tried by a jury on the issues arising on the pleadings as to damages and exceptions to the report of the commissioners. On the trial at November Term, 1893, the plaintiff insisted that she had the right to recover actual damages to the land besides the actual value of the land taken. The defendant insisted that, under the decision of the former appeal as reported in 109 N. C., p. 52, the plaintiff was limited to the value of the land actually taken, and this was the sole contention.

The following facts were admitted by both parties:

"1. The railroad was completed on the *locus in quo* more than two, but less than three, years before this action was commenced.

"2. That at the time said railroad was constructed and completed the plaintiff was not the owner of the *locus in quo*.

"3. That at the time the road was built Joseph John Harrell and wife were the mortgagors in possession of said land and J. W. Perry and T. R. Jernigan the mortgagees, and under a foreclosure of said mortgage J. W. Perry became the purchaser, and on May 15, 1890, conveyed the *locus in quo* to defendant.

"4. On May 19, 1887, said J. John Harrell and wife conveyed to defendant the right of way over said land. The said mortgage was registered prior to the commencement of the construction of said road, and no consent to said right of way was obtained from said mortgagees.

"5. And the damages (if the plaintiff is entitled to recover) are to be hereafter assessed according to law.

"6. The charter of defendant company, as it appears in the Act of Assembly, is made a part of the statement of facts."

The plaintiff tendered the following issue:

"What amount of compensation is the plaintiff entitled to by reason of the construction of the road across her lands and building the depot thereon?"

The defendant tendered the following issue:

"What was the value of the lands taken and occupied by the defendant at the time of its occupancy?"

The Court declined to submit either of these issues, and submitted the following:

"1. What was the value of the land taken and occupied by the defendant at the time of its occupancy? Answer, $125.

"2. What is the damage, if any, to the other lands of the plaintiff (set out in the pleadings) by reason of the building of said railroad through her lands and its use and operation by the defendant? Answer, $375.

The plaintiff then introduced as a witness one White, and proposed to ask him how much damage the railroad and depot do the lands of the plaintiff. To this question the defendant objected. Objection overruled, and the defendant excepted.

Witness testified that, considering the way the land was left, injury to drainage and inconvenience the road made in farm, it was damaged $1,000.

The plaintiff offered several other witnesses, whose evidence tended to show that the land actually taken was worth $125; that the damage to the land not actually taken was from $500 to $800, caused by draining water on the land, thereby rendering it unproductive, and the inconvenience caused in getting about the farm, the road running entirely across the farm, from three-quarters to one mile, cutting it in two parts; could not cross the railroad in the farm except at one place; could not drain the land.

The defendant introduced witnesses tending to show that the actual value of the land taken was $125, and the damage to the other lands nothing.

Upon the conclusion of the evidence the defendant asked, in writing, for the following instructions:

"1. That the plaintiff can only recover the value of the land taken and occupied by the defendant for its road-bed and depot.

"2. That if the jury find that the defendant company had appropriated the land described in the pleadings before the plaintiff acquired the same by deed from J. W. Perry, then that the plaintiff, not being the tenant in possession at the time of its occupation, is not entitled to such damages as were incidental to defendant's entry thereon."

There was no exception by the defendant to the instruction of the Court as to the measure of damages, the only point raised being that the plaintiff was limited to the value of the land actually taken.

The jury returned a verdict answering the first issue "$125," and the second issue "$375." The defendant then prepared and tendered to the Court judgment for $125, upon the payment of which the plaintiff should execute deed to the defendant for the land actually taken and in the occupation of the defendant.

The Court refused to sign such judgment, and adjudged that the plaintiff recover of the defendant the sum of $500 and costs of the action, upon payment of which title to the land taken should vest in the corporation as allowed by its charter and by chapter 49, Vol. I of *The Code*, and that the right of the plaintiff should thereupon be divested in and to the same. From this judgment the defendant appealed.

Mr. F. D. Winston, for plaintiff.

Messrs. J. B. Martin, R. B. Peebles and *W. H. Day*, for defendant (appellant).

SHEPHERD, C. J.: When this case was before us on a former appeal (109 N. C., 52) it was held that the defendant acquired no title to the right of way under the deed of the mortgagor, and that the mortgage having been foreclosed the title to the land became vested in the plaintiff, who purchased at the foreclosure sale. We also held that under the general railroad act (the provisions of which control this case) the simple entry and occupation of the defendant conferred upon it no right to the easement, and that this could only be acquired by grant or by virtue of proceedings to condemn. This being so it is plain that unless an easement is acquired in some way by the defendant it has no legal right to occupy any part of the plaintiff's land; and as this right is to be acquired in this proceeding it must follow that compensation must be awarded the plaintiff not only for the land actually occupied, but also for damages to her adjoining land, as in other cases. The plaintiff, as we remarked on the former appeal, can recover no damages incident to the entry—such as the destruction of crops and the like—nor for use and occupation before she acquired title. These damages are personal to the owner—"fruit fallen"—and do not pass to his grantee. The plaintiff is not seeking to recover such damages in this action, but simply compensation for an easement which the defendant is now to acquire in her land, and if the enjoyment of this easement will have the effect of injuring the adjoining lands of the plaintiff it must follow that such damages must also be assessed. Counsel for defendant contended that, conceding this to be true, there was error in submitting issues which comprehended other elements of damage, and that the jury might have included the damages personal to the former owner. In answer to this proposition it is only necessary to say that there was no evidence of any damage except for the land taken and the injury to the adjoining land. It is further to be noted that there is no exception whatever as to the measure of damages nor to the charge of the Court, "the only point raised being that the plaintiff should be limited to the value of the land actually taken."

As the leading principle governing the case was examined and passed upon in the opinion upon the former hearing it is unnecessary to enter into a more elaborate discussion of the subject.

We will remark, however, that a different rule prevails where a right is acquired by the entry alone, leaving the damages to be subsequently assessed, and the authorities, therefore, from such jurisdictions are not in point. It may further be observed that if the previous owner had sued for permanent damages by reason of the location and construction on the road he would by such act have conferred the easement upon the defendant. *White* v. *Railroad*, 113 N. C., 610—622. Such does not appear in this case, and we can see no error in the ruling of the Court. The exception relating to the right of a jury trial upon the exceptions of the commissioners was abandoned on the argument.

Affirmed.

SUSAN M. FULP, Administratrix of J. Wesley Fulp, v. ROANOKE & SOUTHERN RAILWAY COMPANY.

Action for Damages for Injury Resulting in Death—Negligence—Failure to Give Signal of Approach of Train—Person Walking on Track.

Where, in an action against a railroad company for negligently causing the death of plaintiff's intestate, the complaint alleges no other negligence than the failure of the engineer to give any notice, by whistle, bell or otherwise, of the approach of the train to intestate, who was walking on the track and was run over and killed by the locomotive, no sufficient cause of action is stated.

CIVIL ACTION, heard before *Winston, J.*, at December Term, 1893, of FORSYTH Superior Court.

The plaintiff sought to recover damages for the negligent killing of her intestate by the defendant. The only allegation of negligence stated in the complaint was as follows:

"That on the ---- day of -------, 18--, the deceased, the plantiff's intestate, was going to his home, and walking upon the defendant's track; he was, by the negligence of the defendant and its servants, in that it failed to give any notice of its approach by whistle or bell or otherwise, run over by defendant's locomotive and killed without any fault of plaintiff's intestate."

When the case was called for hearing the defendant moved to dismiss the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, as an oral demurrer. The demurrer was sustained, and plaintiff appealed.

Mr. J. S. Grogan, for plaintiff (appellant).

No counsel *contra*.

SHEPHERD, C. J.: The demurrer was properly sustained, as the only negligence is that the defendant failed to give any notice of the approach of its train "by whistle, bell or otherwise" to the intestate, who was walking on its track. We know of no law which imposes a liability upon a railroad company upon such meagre allegations.

Affirmed.

CLAUDIUS BOTTOMS v. THE SEABOARD & ROANOKE RAILROAD COMPANY.

Action for Damages—Negligence—Contributory Negligence of Child—Negligence of Child Imputed to Parent—Railroad Companies, their privileges and duties.

1. An infant twenty-two months old is incapable of contributory negligence so as to relieve a railroad from liability for the negligent acts of its employees.
2. The negligence of a parent or guardian in allowing a child of tender years to stray and wander on a railroad track cannot be imputed to such child so as to relieve a railroad company from responsibility for the negligence of its employees in an action brought by or on behalf of the child.
3. While an engineer of a moving train has the right to suppose that an adult on the track will leave it and is not required to slacken speed, yet when a child without discretion or intelligence is seen or can be seen its presence must be regarded; and if the engineer, by the exercise of reasonable care and prudence, can discover a child on the track in time to stop the train, or can, with the exercise of reasonable or ordinary care and prudence, discover that a small child is going towards the track or running near so as to make it probable that it will go on the track, and such discovery can be made in time to stop the train, it is the duty of the engineer to stop and negligence in the company if he does not stop.

(Discussion by the Chief Justice of the doctrine of "imputed negligence").

This was a CIVIL ACTION, tried at Spring Term, 1893, of the Superior Court of NORTHAMPTON County, before *Hoke, J.*, and a jury.

The following issues were submitted to the jury:

"1. Was the plaintiff injured by negligence of defendant?

"2. Did plaintiff's own negligence contribute to his injury?

"3. Notwithstanding the contributory negligence of plaintiff could defendant have avoided the injury by the exercise of ordinary care and prudence?

"4. What damage is plaintiff entitled to recover?"

The defendant, after the evidence was closed, objected to the submission of the third issue. Objection overruled, and defendant excepted.

John Morgan, witness for the plaintiff, testified: "The plaintiff was struck by defendant's train at Seaboard, in this county, in the fall of 1889; happened near a house five hundred yards from depot, on south side of road. Turner Bottoms is father of Claudius. His house is fifteen yards from railroad, on north side; a house thirty or forty yards on south side road. It was eleven o'clock A. M.; fair day and little wind. I saw the engine when it struck plaintiff; it occurred thirty or forty yards from witness's house, almost opposite the house, little towards Seaboard. There was a county crossing at place. There was no ringing of bell or blowing of whistle. Mother was at my well, drowing water. I saw it before it was struck in middle of the track, and at that point track a little elevated, and place approached on an up grade from Seaboard; think train had stopped at Seaboard that day. Engineer, by looking out, could have seen the child from Seaboard five hundred yards; there was nothing to obstruct view. Witness got to child first; it appeared to be about dead when others got to it; blood running from its mouth and nose; did not examine its legs; back part of head seemed injured, but child appeared to be dying and witness didn't observe it closely. There was a path crossing road at place, going from one place to other; county crossing is between this path and Seaboard. There were no bushes to obstruct view; no other obstruction between Seaboard and place where child was struck; child was running from engine towards south, and had gotten twenty-five or thirty yards from path; witness didn't know how long it had been on track; child was twenty-two months old; one hundred yards between the crossing and path."

Cross-examined.—"The mother was in habit of coming for water, but witness don't know that child had come with mother before. Witness said on another trial that he first saw child ten steps from engine; child was twenty-five or thirty yards from path where it was struck. Witness said before, and says now, that child was knocked as high as head-light. County crossing three or four hundred yards from depot; didn't whistle that day at depot. They whistle for crossing at or near depot usually. Train was running at pretty good speed."

Ed. Smith, witness for plaintiff, testified: "Saw child at a distance of four or five hundred yards down track towards Seaboard. Witness went up on bank to see train pass, and was looking towards train; saw child and saw train when it struck child; child was coming towards witness when it was struck; child was thrown down the embankment on the south side; pitched up first towards head-light; up grade from Seaboard nearly all the way from depot to child, and there was a bank three or four feet high where child was struck; child was twenty or thirty yards beyond path from depot when struck: saw child when it got upon road; it had to get up the bank to get on; train was at switch, one hundred and fifty or two hundred yards from where it struck child. If child was on track it could have been seen from depot, and could also see child at side of the track from depot. There was nothing to obstruct view. Witness could see both child and engine from point where witness was. It was clear view. Witness never heard train blow or give any signal for crossing, nor when it approached child. It was a fair day; train made no stop after striking child, nor before, that witness could discover; witness could have heard signal if it had been given; was in five feet of track; the view was clear and unobstructed forty or fifty feet on either side of the track, looking from depot; saw child after carrying it home, either in evening or next morning."

Other witnesses for the plaintiff testified that, though they were a few hundred yards from the place of the accident, they heard no whistle or ringing of bell at or about the time the accident occurred.

Witnesses for the plaintiff also testified that there were no bushes or other obstructions to the view near the track where child was struck.

Mary J. Bottoms, witness for defendant, testified: "Am mother of plaintiff. I left child in the house and left the door open; child had not been in habit of following witness for water; witness might have said child had followed before, but don't recollect it; no one was left with child in the house; child had seen witness going in that direction; house was one step above the ground; the child, at that time, could walk all about, but didn't walk off by itself."

Cross-examined.—"When train struck child witness was at well."

Re-direct.—"Child fell off bed and re-broke its leg after the doctor had set it, two or three weeks after injury; witness and her husband worked for a living, and had no one to leave with child."

Ed. Clark, a witness for defendant, testified: "Am locomotive engineer, and have been for fifteen years; was the engineer on passenger train that day; when witness left depot blowed crossing blow at whistle-post, a post to notify engineer when to blow; this post is fifty yards from Seaboard; blew two long and two short blows; know where Bottoms' house is, and was running twenty or thirty miles an hour; witness was an engineer, and his duties were to look ahead as much as possible when not necessarily engaged on matters in engine; it was possible for child to have gotton on track one hundred yards ahead and witness not seen it at all; engineer's first duty is to look after safety of his passengers by keeping water to proper level and in other ways in engine, and by looking ahead on track; chief observation is to the track proper, down the center of it, and does not observe objects on side of track unless something unusual attracts his attention; witness's position is on right, and everything on left side would have to be at least forty yards forward on left side to come in sight; witness did not see child that day; was looking ahead that day; saw something cross, and asked fireman if he hit anything; fireman looked back and said a woman there was wringing her hands and seemed crazy."

Cross-examined.—"Witness don't know what he was doing at the particular time, but swears he was attending to some duty as engineer; said on former trial that there were some bushes or undergrowth along bank that might have hid child from view, and says that now; track up grade; could have seen child from depot; could have seen it was some object on track. Morgan swore before that he heard mother say child was left at home by itself and followed her after water."

Dr. Stephenson, witness for defendant, testified: "Don't think the injury of the plaintiff permanent; child is awkward and clumsy."

George Davis, witness for defendant, testified: "Was fireman on engine; whistle was blown and bell rung at crossing."

Cross-examined.—"Didn't see child; saw pig; curve to right going towards Weldon; looking back to see if engine had struck some pigs, and saw back one hundred yards to woman wringing her hands, etc. I called Mr. Clark's attention to pigs."

Defendant closed.

The Court charged the jury, as to the first issue, as follows:

"If the defendant, by the exercise of reasonable care and prudence, could have discovered the child on the track in time to have stopped the train, it was its duty to have done so; or, if defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going towards the track or running along very near it, so as to render probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was the defendant's duty to stop, and the defendant would be guilty of negligence in failing to stop. The engineer has a right to suppose that an adult will leave the track and continue its speed, but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be discovered in time to stop the train in the exercise of ordinary care, then there is no negligence; or, if it came on the track when the engineer and fireman were engaged in their necessary duties in the cab, and they were so engaged long enough to prevent them from observing the child, then there was no negligence. The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper outlook on the track, and for objects so near it as to make their presence a probable obstruction or interruption. If the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child or came so near it that the engine could not be stopped in the exercise of ordinary care, the defendant would not be guilty of negligence."

To this charge the defendant excepted.

The Court further charged the jury that if they believed the evidence they should answer the second issue, "Yes."

The Court further charged the jury as to the third issue: "But the contributory negligence of the plaintiff does not necessarily justify or excuse the defendant. If, notwithstanding this negligence of the plaintiff, the defendant could have avoided inflicting the injury by the exercise of ordinary care, the defendant would still be responsible, and the jury should answer the third issue, 'Yes.' If the defendant, by the exercise of reasonable or ordinary care and prudence could have discovered the child on the track in time to have stopped the train, it was its duty to have done so; or, if defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going toward the track or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was the defendant's duty to stop. The engineer has a right to suppose that an adult will leave the track and continue his speed, but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be seen in time to stop the train in the exercise of ordinary care, then you will answer the third issue, 'No.' The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper outlook on the track, and for objects so near it as to make their presence a probable obstruction or interference, and if the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child, or so near the child that the engineer could not have stopped the train by the exercise of ordinary care, then you will answer the third issue, 'No.'"

Upon this issue the Court repeated, in substance, its charge to the jury on the first issue, and charged the jury, among other things, as follows:

"The failure to blow the whistle was not of itself negligence, because the injury did not result from it, but the failure to blow, if it occurred, is evidence on the general question as to whether the defendant was in the exercise of ordinary care."

To this charge defendant excepted.

There was a verdict for the plaintiff and judgment thereon for $1,200, and defendant appealed.

Mr. E. C. Smith, for plaintiff.
Mr. W. H. Day, for defendant (appellant).

SHEPHERD, C. J.: It is unquestionably true, as argued by counsel, that in order to maintain an action for negligence the plaintiff must not only show the existence of a duty on the part of the defendant, but he must also show that the duty is due to him. *Emry* v. *Navigation Co.*, 111 N. C., 94. It has been decided by this Court that it is the duty of an engineer in running a railroad train to exercise ordinary care by keeping a lookout on the track in order to discover and avoid any obstructions that may be encountered thereon. This duty is due to passengers; and, as a general rule, the duty is likewise due to the owner of cattle running at large; to the owner of other property which, under certain circumstances, may be on the track; and also, as a general rule, to persons who may be on the same at places other than crossings. It has also been decided in many cases, and may be regarded as perfectly well settled, that the failure to exercise such ordinary care in discovering persons or property in time to avoid a collision cannot, except in the case of cattle running at large, be made the subject of a recovery where the plaintiff's negligence is the proximate cause of the injury.

In the present case the jury have found, under proper instructions of the Court, that the plaintiff was injured by reason of the negligence of defendant. The plaintiff is, therefore, entitled to recover unless he was guilty of negligence as above stated. The real questions presented, therefore, are whether the plaintiff was of sufficient age and discretion to be capable of contributory negligence, and if not so capable, whether the negligence of the parent can be imputed to him?

It is admitted by the pleadings that the plaintiff was at the time of the accident "an infant of tender years" who had been permitted by its mother "to stray and wander" on the track of the defendant. From the language of the admission we would, if it were necessary for the purposes of this decision, be well warranted in holding that *prima facie* the plaintiff was of such a tender age as to be incapable of negligence. Apart from this, however, it is established by uncontradicted testimony, and also admitted by counsel for the defendant, that the plaintiff at the time of the accident was, in fact, but twenty-two months old. In several of the States it has been held that an infant of that age is as a matter of law incapable of contributory negligence (2 Thompson Neg., 1181); while in others it is held, in analogy to the rule of the common law as to criminal responsibility, that an infant under the age of seven years is also incapable, but that the presumption may be rebutted by testimony and that the question may be determined by the jury. 1 Shearman & Red. Neg., 73, n.

Applying either rule to the present case, it is clear that the plaintiff was incapable of contributory negligence, and it must follow that unless the negligence of his mother can be imputed to him there is nothing to bar his recovery.

Conceding only for the purposes of this discussion that the mother was guilty of contributory negligence in going to the well and leaving her infant child in the house without closing the door, and also conceding, what is intimated in *Manly* v. *Railroad*, 74 N. C., 655, and indeed is well sustained by the authorities, that if it be contributory negligence it would defeat an action brought by the parent, we are not prepared to accept the doctrine which obtains in some few jurisdictions that such negligence can be so imputed to the child as to defeat an action when brought in its own behalf.

As the question has never been passed upon in this State it may not be inappropriate to quote at length from some of the leading authorities upon the subject. The imputation of the negligence of parents and guardians to children of tender age is, says Shearman & Redfield (Vol. I, 74), an invention of the Supreme Court of New York in the leading case of *Hartfield* v. *Roper*, 21 Wend., 615, and has been followed in many of the decisions of that State, although it is said by these authors to be founded upon a *dictum* which has only been assumed to be the law by the Court of last resort, but never squarely presented to that tribunal for decision. And they further remark that it may well be doubted whether the question has ever been fully argued anywhere, and that the result of their examination of the cases is to satisfy them "that the last of the long series of so-called decisions on this point is like the first, a mere *dictum* uttered without hearing argument and without consideration."

Some of the decisions approving the doctrine are based upon the ground that the parent must in law be deemed the agent of the child, while others put it upon the ground that the child is identified with its parent or guardian, "a legal fiction which led to the famous and now exploded decision of *Thoroughgood* v. *Bryan*, 8 C. B. 116," recently overruled by the English appellate Court in "The Bernia." L. R., 12; Pro. Div., 58; 1 Shearman & Red., *supra*, sects. 66-75. In reviewing the case of *Hartfield* v. *Roper*, *supra*, Mr. Beach says that the doctrine as applied to children too young to exercise discretion is an anomaly and in striking contrast with the case of a donkey which is carelessly exposed in the highway and negligently run down and injured, and also with the case of oysters carelessly placed in the bed of a river and injured by the negligent operation of a vessel; in both of which cases actions have been maintained. And he forcibly observes that under the principle referred to "the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years." This author in his examination of the doctrine remarks as follows: "It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit he is *sui juris*. As far as his right of action is concerned he is in no respect the chattel of his father. * * * The judgment (when suing by guardian or next friend), if any is recovered, is the property of the minor; it is recovered to his sole use. It is an entirely false assumption in *Hartfield* v. *Roper* that the parent or guardian may recover heavy verdicts for their own misconduct. Again, it is assumed in that opinion that an infant, injured by the joint negligence of his parent and a third person, can have legal redress against the parent. 'It is much more fit,' say the Court, 'that he should look for redress to that guardian.' If this be so, if the right of the infant be so distinct from the duty of the parent that the relation of parent and child is not an objection to the maintenance of such a suit, then the whole theory upon which this class of cases rests falls to the ground. Again, it is falsely assumed that the parent is the agent of the child. * * * The relation of child and parent is not the relation of principal and agent, neither is it analogous to it. The child does not appoint his father; he has no control over his acts; he cannot remove him from power and appoint another in his stead; he has no right of action against him; every element of agency is wanting. The want of any one of these elements is sufficient to prevent the acts or omissions of the parent from being received as the acts or omissions of the child upon any analogy drawn from the law of agency. By the common law a child cannot appoint an agent. The authority by which the parent exercises control over the child is therefore an authority derived from the law. It is a principle of law laid down before 'the spacious days of great Elizabeth' that the abuse of an authority derived from the law shall not work harm to or prejudice the rights of the person subjected to it. The parent's authority is given for the protection of the child, but the principle of *Hartfield* v. *Roper* turns the shield into a sword and uses it to deprive the child of the very protection arising from the parental relation." Beach Con. Neg., 42.

In Wood on Railroads, sec. 322, it is said: "The doctrine announced in this case (*Hartfield* v. *Roper*) has been followed in some jurisdictions, but the modern tendency is to reject it, and to hold the negligent injurer liable for the consequences of his own wrongful act regardless of the contributory negligence of the child's parent or guardian."

Bishop, in his work on Non-contract Law, 582, emphatically rejects the doctrine, and observes that it is "as flatly in conflict with the established system of the common law as anything possible to be suggested." And an examination of the leading text-books which treat of negligence will disclose that it is also disapproved as being contrary to principle and reason as well as the rapidly accumulating weight of authority. Wharton Neg., 312–314; Pollock Torts, 299; Cooley Torts, 681; 2 Thompson Neg., 1184; Shearman & R., *supra;* Beach, *supra.*

In Tennessee the doctrine is denounced as being opposed "to every principle of reason and justice" (*Whirly* v. *Whiteman*, 1 Head., 610), and in Pennsylvania it is declared to be "repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." *Kay* v. *Railroad*, 65 Pa., 269.

In *Newman* v. *Phillipsburg Horse Car Co.*, 52 N. J. Law, 446, Chief Justice BEASLY, after exposing the fallacy of basing the doctrine on the ground of agency, demonstrates its untenableness by conducting us to the rather absurd conclusion of making an infant in its nurse's arms answerable for all the negligence of such nurse while thus employed in its service. "Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglect of the guardian is to be regarded as the neglect of the infant, as was asserted in the New York decision, it would from logical necessity follow that the infant must indemnify those who should be harmed by such neglect."

In Vermont the subject was examined with much care in the leading case of *Robinson* v. *Cone*, 22 Vt., 213, in which the Court denied the doctrine of imputed negligence as laid down in Hartfield's case, and held that, although a child of tender years may be in the highway through the fault or negligence of his parents and so improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from redress. "All," says Judge REDFIELD in delivering the opinion, "that is required of an infant plaintiff in such a case being that he exercise care and prudence equal to his capacity." This rule is also laid down in *Railroad* v. *Gladman*, 15 Wall., 401, which is cited with approval in *Murray* v. *Railroad*, 93 N. C., 92.

"The Vermont rule, as it is called," remarks Shearman & Redfield, "commends itself to our judgment and is abundantly justified by the reasoning of the Courts which have adopted it. * * * It should be fully applied to such cases, giving to defendants who suffer from its hardships the same consolation which Courts administer to plaintiffs when nonsuiting them—that their case is very hard and deserves sympathy, but that the law must not be relaxed to meet hard cases." "If, where one or two innocent persons must suffer, the law puts the loss, as it justly does, upon the one who has by some negligence enabled the wrong to be done, surely when there are two guilty persons in the transaction the law should not leave the only innocent one to suffer, as it practically does, by referring him to his parent or guardian for an injury of which a stranger has been the principal cause" (sections 77, 78). "No injustice can be done to the defendant by this limitation of the defence of contributory negligence since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault" (section 73). The doctrine of *Hartfield* v. *Roper* has also been denied in Pennsylvania, Ohio, Connecticut, Missouri, Nebraska, Alabama, Tennessee, Texas, Georgia, Louisiana, Illinois, Iowa, Maryland, Michigan, Mississippi, New Hampshire, Virginia, and perhaps in other States, while some of the Courts which have heretofore adopted the rule are subjecting it to so many qualifications in order to escape its harshness and injustice that but little of its original similitude remains. *Iron Co.* v. *Brawley*, 83 Ala., 371; *Daley* v. *Railroad*, 26 Conn., 591; *Ferguson* v. *Railroad*, 77 Ga., 102; *Railroad* v.

Wilcox, 33 Ill. App., 450; 27 N. E. Rep., 899; *Wymore* v. *Maharka Co.*, 78 Iowa, 396; *Westerfield* v. *Lewis*, 43 La. A., 63; *Railroad* v. *McDowell*, 43 Md., 534; *Shippy* v. *An Sable*, 85 Mich., 280; *Westbrook* v. *Railroad*, 66 Miss., 560; *Winters* v. *Railroad*, 99 Mo., 509; *Huff* v. *Ames*, 16 Nebraska, 139; *Basilon* v. *Blood*, 64 N. H., 565; *Railroad* v. *Snyder*, 30 Ohio St., 451; *Smith* v. *O'Conner*, 48 Pa., 218; *Railway Co.* v. *Moore*, 59 Tex., 64; *Railroad* v. *Ormsby*, 27 Gratt., 455. These numerous authorities which we have thought proper to cite very abundantly sustain the position enunciated by the Supreme Court of the United States and adopted by this Court in *Murray* v. *Railroad*, *supra*, that in the law of negligence the degree of care and discretion required of an infant of tender years "depends upon his age and knowledge," and they also sustain the position that where the child is too young, as in this case, to exercise any discretion whatever, the negligence of his parent or other custodian in permitting him to escape and place himself in a perilous position will not be imputed to him so as to defeat his action for damages sustained by reason of the negligence of another.

There is nothing in Murray's case, *supra*, which at all conflicts with this view. The plaintiff was nearly eight years of age and of sufficient discretion to understand the danger to which he had exposed himself, and under the circumstances the Court held that he could not recover. The authorities quoted in the opinion, so far as they have any bearing upon this case, are in support of the view we have taken. Our attention, however, was called to a part of the opinion purporting to be founded upon a paragraph in a former edition of Shearman & Redfield, to the effect that while an infant should be held to a degree of care only as is usual among children of his age, yet, "if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury," he cannot recover. In the fourth and later edition (section 73) of the same work this passage is reproduced with the following comments: "It was held in some English cases that if a child's own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of danger, the latter cannot recover damages. But these decisions have been condemned in England and are directly opposed to the current of American cases. The law has been settled to the contrary in America by the famous series of turn-table cases, in which railroad companies have been held liable by the Federal Supreme Court, as well as by several State Courts of last resort." While the passage is really inapplicable to cases like the present, but only, it seems, to those in which, like the turntable cases, the child meddles with something which is perfectly harmless if let alone, and he thus "directly" brings the injury upon himself, we have nevertheless thought it best to show that in the opinion of the learned authors the proposition stated in the former edition of their valuable work is not sustained by the weight of authority.

Neither is there anything in *Meredith* v. *Railroad*, 108 N. C., 616, cited by counsel, which approves of the principle of imputable negligence. The question was not before us, but what was said *arguendo*, assimilating a child apparently too small to appreciate its danger to persons who are apparently helpless on the track, in respect to the duty of the engineer to use all available means to avert a collision, is really in support rather than in contradiction of the views we have expressed in this opinion.

We commend the charge of his Honor upon the first issue as a correct exposition of the duty of railroad companies in moving their trains, and especially the limitations with which it is accompanied. The use of the words "ordinary care," unattended with explanation, would have been obnoxious to the authorities in this State (*Emry* v. *Railroad*, 109 N. C., 589), but as it is apparent from the instructions that they were used to indicate a vigilant lookout and also the exercise of all efforts within the power of the engineer to stop the train, we do not see how they could have prejudiced the defendant. Indeed, no objection to the charge in this particular was made on the argument and this we suppose for the reasons we have given.

Under these instructions it has been found that the defendant has been guilty of negligence, and as we are of the opinion upon the admitted facts that the plaintiff was incapable of contributory negligence the judgment of the Court below must be sustained, and it therefore becomes unnecessary to consider the learned argument of defendant's counsel upon the subject of contributory negligence in its relation to what is commonly known as the rule of *Davies* v. *Mann*. Affirmed.

CLARK, J., concurring: I concur in the conclusion reached, but dissent from some of the reasons given. The Judge charged the jury, I think, correctly, that "If the defendant by the exercise of reasonable care and prudence could have discovered the child on the track in time to have stopped the train, it was its duty to have done so; or if the defendant in the exercise of reasonable or ordinary care and prudence could have discovered that a child of the age of twenty-two months, or very small, was going towards the track or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was defendant's duty to stop, and defendant would be guilty of negligence in failing to stop. The engineer has a right to suppose that an adult will leave the track, and continue the speed, but when a child, without discretion or intelligence, is seen or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be discovered in time to stop the train in the exercise of ordinary care, then there is no negligence; or if it came on the track when the engineer and fireman were engaged in their necessary duties in the cab, and they were engaged long enough to prevent them from observing the child, then there was no negligence. The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper lookout on the track, and for objects so near it as to make their presence a probable obstruction or interruption. If the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child or came so near it that the engine could not be stopped in the exercise of ordinary care, the defendant would not be guilty of negligence"; and upon that instruction the jury found against the defendant. While the general underlying principles of the law do not change, their application in the changing conditions of life and the progress and development of the age must change. Originally, when air-brakes were unknown, and even after they were first introduced, a railroad company would not have been held liable for an injury caused by not stopping within the distance air-brakes would have made possible. The law is otherwise now. So, recently Congress by an enactment has followed some Courts and anticipated others by making railroad companies liable after a given date for all injuries caused by failure to use automatic couplers on freight as well as on passenger cars. And there are many similar instances of the progress of the law, hand in hand, with the progress and development of the times. So, when the speed of railway trains was a fraction of what it is now, and the population sparse, it was not recklessness to fail to keep such a lookout as is now necessary to prevent accidents. But now that the number and speed of railway trains are vastly increased, and the population of the country also, a better lookout is required. A failure to keep a lookout, which in a given case the jury find would have prevented an accident, notwithstanding the negligence of the plaintiff in being helpless on the track, is recklessness in a high degree. It has always been held, and by all Courts, *semper et ubique*, that though the plaintiff has been negligent, if, notwithstanding that fact, injury by the defendant could have been avoided, but the defendant through recklessness or wantonness committed the injury, the defendant is liable.

There is no disposition in the Courts to throw restrictions around railroads in the free use of their tracks. They are becoming more and more important. Over their tracks roll daily the commerce of a people, the transportation of a continent. But with development comes the duty of increased care to avoid injury. Air-brakes, automatic couplers, Miller platforms, electric head-lights, heavier rails and other improvements permit accelerated speed, and the public demands it. But with the increased speed comes the duty of a better lookout. It is recklessness not to have it. The company should be held liable for every injury which could be avoided by a proper lookout, whether as to passengers, children, live stock, or people temporarily disabled and lying on the track. As to whatever it strikes a railroad engine is as deadly as a cannon ball. When there is target firing, though due notice is given, if a drunken man wanders across the field of fire and is lying asleep at foot of the target, but by proper lookout could be seen, yet for want of it he is struck and killed, I apprehend this would be deemed recklessness. The same holds true as to a drunken man down and helpless on the track, when by keeping a proper lookout he would be seen and his death or injury avoided.

JAMES C. MASON v. RICHMOND & DANVILLE RAILROAD COMPANY.

Action for Damages—Negligence—Contributory Negligence—Proximate Cause of Injury—Brakeman Coupling Cars—Disobedience to Rules—Waiver—Vice-principal.

1. Where a plaintiff brakeman disregarded the rules of a railroad company forbidding brakemen to go between the cars in coupling them, which he had agreed to observe, and was injured, the fact that the conductor of the train, who had previously seen him go between cars in coupling them, told him to "hurry up and couple the cars" did not amount to an order to go between the cars so as to relieve the plaintiff from the imputation of contributory negligence in so doing.
2. While a brakeman is not culpable for exposing himself to danger in disregard of the rules of the company but in obedience to the orders of the conductor in charge of the train, yet the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not otherwise be coupled did not justify him in doing so several months later when under the control of another conductor who gave no such order.
3. Where plaintiff and defendant were both concurrently negligent and the negligence of the former was the proximate cause of injury to the plaintiff the latter cannot recover damages for the same.
4. A conductor in charge of a railroad company's train is, as to those subject to his orders on the same train, a vice-principal acting for the company.

CIVIL ACTION for damages, brought by the plaintiff against the defendant for personal injury suffered on the morning of December 14, 1889, at Durham, N. C., tried before *Brown, J.*, and a jury, at Augut Term, 1893, of GUILFORD Superior Court.

The plaintiff was a brakeman on a "mixed train" running between Raleigh and Greensboro on December 14, 1889, of which Capt. C. B. Guthrie was the conductor. Plaintiff had served under Captain Guthrie for three months previous and had formerly been working on a train of which Capt. J. E. Dick was conductor. While serving under Dick plaintiff signed a printed agreement as follows:

"I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick; and that brakemen or others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and in consideration of being employed by said company I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above and fully understand it.

"(Signed) J. C. MASON."

Part of the agreement is in his own writing, to-wit, "I have read the above and fully understand it." This paper is dated February 2, 1889.

On the trial the agreement was read to the jury and put in evidence.

Plaintiff testified that at the time he signed the agreement, February 2, 1889, and afterwards Captain Dick told him, "When you cannot couple with a stick couple with your hand."

Concerning the injury complained of, plaintiff testified: "That on December 14, 1889, he was in the employment of the Richmond & Danville Railroad Company as a brakeman and baggage-master, on a mixed train running between Greensboro and Raleigh. That he arrived at Durham on the morning of the 14th December, 1889, at 6 o'clock, and it was still dark at that time. The conductor, Mr. C. B. Guthrie, ordered the witness to get some freight cars from a side-track, which he did and threw the cars out on the main line. Guthrie told witness, "Hurry up and couple cars; we are behind and must get away from here." He went back to couple the cars. He had a coupling stick about four feet long, which he had picked up from the side of the track. The railroad company did not furnish the sticks, but the brakemen got them from the saw-mills and other places along the line of the road. The witness had a lantern which he used in making the couplings. It was quite dark and the lantern was the only light he had. He put the pin in the drawhead, as he thought it would easily couple, but the pin was crooked and did not slip down. The witness then stepped in between the cars so as to push the pin down with his hands. While thus engaged he heard the cars attached to the engine coming back. Witness looked to see if there were any bumpers attached to the cars and saw none. He commenced going back to get out, but before he got out the corners of the cars came together and crushed him. He was injured in the breast, hurting his lungs, ribs and breast-bones. He knew nothing for several hours. He was hurt about 6 o'clock in the morning. The ends of the cars struck him and the corners caught him between them.

"Witness had coupled cars with his hands before. He thinks Guthrie had seen him do it."

Plaintiff's counsel in response to an inquiry by the Court stated that he did not claim that Guthrie ever gave orders to the plaintiff to use his hand in coupling. Conductor Dick left the service of the company some little time after witness was hurt. Witness had not served under Dick for some months before witness was hurt.

Upon the evidence of the witness, and upon the statement of the counsel that the plaintiff did not claim that Conductor Guthrie ordered him to use his hand in coupling cars on December 14, 1889, or that Conductor Guthrie had ever at any time told him to use his hand in coupling when he could not adjust the pin with a stick, the Court intimated the opinion that the plaintiff could not recover. In deference to the opinion a juror was withdrawn, and the plaintiff took a nonsuit, and excepted to the ruling and intimation of the Court and appealed.

Mr. J. A. Barringer, for plaintiff.

Messrs. D. Schenck and *Busbee & Busbee*, for defendant.

AVERY, J.: When this case was brought before us by the former appeal (111 N. C., 482) there was evidence that the conductor in charge of the train, when the defendant was injured between two of the cars composing it, had told the defendant that "whenever he could not couple the cars with a stick, to go in and couple them with his hands," and that the latter, finding it impossible to couple otherwise, had exposed himself to danger in obedience to that order. In that aspect of the testimony the question arose whether a conductor in charge of a separate train was a vice-principal clothed with authority of the corporation to waive its own rule and thereby, in advance, condone the negligent conduct of the defendant, or prevent the company from pleading it as his voluntary act. "The question involved" (said the Court) "in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. * * * That a brakeman feels impelled to obey the orders of the conductor no observant person can deny; and since we can take judicial notice of a relation so common and well understood it would be a voluntary preference of fiction to fact were we to adhere to an arbitrary rule founded upon a supposed reason that we know does not exist."

It was admitted on the trial below, however, that the conductor in charge when the defendant was injured was not the same person who had on a former occasion given the general order mentioned for the government of the brakeman in coupling cars. We still adhere to the doctrine that a brakeman is not culpable for exposing himself, in obedience to the orders of the conductor in charge of the train, to peril to which his voluntary exposure of himself would constitute contributory negligence. Our ruling was founded both upon the principle that the conductor, as middle-man, had on behalf of the company waived its express regulation, and upon the idea that the known relation between a conductor and a brakeman, running on the same train as his subordinate, was such as to subject him to a well-grounded fear of dismissal should he hesitate to obey such an order, and thereby relieve him of legal culpability for conduct which, but for the fact of his acting under the fear of the consequences of disobedience, would constitute negligence. But we did not intimate or intend to intimate that a brakeman would be warranted in assuming that another conductor, under whom he had served for several months without receiving any order modifying the written rule, would discharge him for failure to couple with his hands when a stick would not answer the purpose. And we do not think that the command of Guthrie to "hurry up," coupled with the testimony of the plaintiff that he thought Guthrie had seen him couple with his hands before that time, is tantamount to an express command, such as was given by Conductor Dick, who had previously been his superior.

The case now presented for our consideration is therefore materially different from that upon which we passed in the former appeal, especially in the fact that the plaintiff voluntarily subjected himself to danger not necessarily incident to the duty which he had contracted to perform, and when, but for his needless exposure of himself, the injury would not have been received. His own carelessness being by that test the proximate cause of the injury, we have here the converse of the general legal proposition to which we gave our sanction in *Deans* v. *Railroad*, 107 N. C., 686. In the one case the defendant company is relieved from liability, because, but for the negligence of the plaintiff supervening upon its own previous want of care, no injury would have been inflicted; while in the other the plaintiff's previous culpability would not have caused the injury if the defendant in turn had not been guilty of subsequent carelessness. There is no better test of the accuracy of mathematical or the soundness of metaphysical reasoning than by considering the reasonableness of the converse of the proposition submitted as a rule.

While we do not consider ourselves under any obligation to change our rulings, in order to conform to those of any Court in the country, except in so far as the Supreme Court of the United States has power of review by virtue of the Constitution, it may not be amiss to say that upon a careful examination of the late authority to which counsel called our attention (*Railroad* v. *Bough*, 149 U. S., 368) we find that the Supreme Court of the United States has not modified or receded from the principle announced in *Railroad* v. *Ross*, 112 U. S., 377, that a conductor in charge of a train is, as to those subject to his orders on the same train, a vice-principal, acting for the company.

For the reasons given we think that there was no error in the intimation of the trial Judge that the plaintiff was not entitled in any view of the evidence to recover.

No Error.

BURWELL, J., concurring: I concur in the disposition made of this appeal because I see in the case no evidence whatever of negligence on the part of the defendant, and abundant evidence of negligence on the part of the plaintiff. The rule of the defendant company, of which the plaintiff had full knowledge, and which, out of abundance of caution, he had been required specially to promise to obey, prohibited him from going between cars for the purpose of coupling or uncoupling them, "under any circumstances," when they were attached to an engine. Having promulgated this general and imperative rule to all its couplers, the servants of the company who were charged with the duty of making up and inspecting trains were permitted to act upon the supposition that it would be obeyed. The engineer was permitted, in moving his engine, to act upon the same belief. The rule was notice to the plaintiff that he should expect no provision for his safety when the cars were pushed together by the movement of the engine, for he was expected not to go between them. Assuming that it was made in good faith (and there is no pretence or proof that it was not), I feel constrained to say that it seems to me a beneficent, not an unreasonable regulation, and that while for some purposes a conductor in charge of a train is an *alter ego* of the corporation that principle should not, in my opinion, be construed to authorize the abrogation by him of rules made by the managing officers of the company to govern the conduct of its employees. The servants of a great transportation company constitute an army in which rigid discipline must be enforced, not less for the safety of the public than for the safety of its own members. There must be obedience or there will be disaster. I think the Courts should seek to encourage the strict enforcement of all reasonable regulations made in good faith.

THE ASHEVILLE STREET-RAILWAY COMPANY v. THE WEST ASHEVILLE AND SULPHUR SPRINGS RAILWAY COMPANY.

Injunction—Street-railways—Charter—Exclusive Privileges—Power of City.

The legislative charter of a street-railway company granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities of a town," gave such authorities no power to grant *exclusive* privileges to the railway company.

Quære, whether the Legislature has the right to authorize a city to grant such exclusive privileges.

CIVIL ACTION, pending in BUNCOMBE Superior Court, heard before *Hoke, J.*, at Chambers at Bryson City, June 13, 1892, on motion to dissolve the restraining order theretofore issued.

In considering the affidavits and exhibits filed in the cause the Court found the facts to be as follows:

"1. That the plaintiff, under a charter granted by the Legislature in 1881, Laws 1881, ch. 64, p. 786, made a contract, or obtained permission from the Board of Aldermen of the city of Asheville, to place and operate a single street-railway along certain streets of the city of Asheville, and amongst other streets were Depot street and Patton avenue; that this permission was given in form of an ordinance of the Board of Aldermen of the city of Asheville, passed in session on December 3, 1887; and of said ordinance the grant was made exclusive for ten years from its date, December 3, 1887.

"3. That under such grant so given the plaintiff constructed and operated a line of street-railway in said city in and upon the streets designated, and has been operating same for three or four years, and on this line so constructed has been carrying freight and passengers from the railroad depot in said city to the Court Square and business centers of the city; and its company has to this time furnished sufficient means and facilities to supply the demand between the two points.

"5. That the defendant, under an act of the Legislature subsequently passed, Laws 1891, ch. 262, p. 208, and under grant and permission from the Board of Aldermen of the city of Asheville, is about to construct and put in operation a street-railway running from Sulphur Springs, about five miles from the city, into said city, and its route passes the railroad depot above mentioned, which is the only railroad depot in said city at present time, and will run into the business center of the same, at or near the Court Square, on a street called College street.

"6. That in running said line the defendant will place its track on Depot street a distance of 450 feet, and on Patton avenue 250 feet; that the route of the defendant as proposed runs from the railroad depot along Depot street 450 feet, and then leaves said street, running along the streets of said city not granted to plaintiff until it again reaches the line of plaintiff at Patton avenue, and runs along said avenue a distance of 250 feet until it reaches College street, passing the post-office, and runs down College street to a point about thirty feet from public square.

"7. That the line of the defendant's track and its construction will not physically interfere with plaintiff's track, but will cause the defendant to compete for passengers and traffic between the railroad depot and business centers of Asheville, and so will greatly impair the balance of plaintiff's franchise and railway.

"8. That the defendant, by using the portions of Patton avenue and Depot street as described, is enabled to approach the business centers of Asheville by a more direct route than it could otherwise obtain, and while its line, with the exception of the above interference, runs along a different way and supplies the residents along such different way with railroad facilities, it is substantially a complete line for patronage between the railroad depot and Court Square in the city of Asheville."

From the above facts the Court, being of the opinion that the Board of Aldermen of the city of Asheville had no authority under existing statutes to make the grant to plaintiff exclusive, dissolved the restraining order theretofore issued, and plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff (appellant).
Mr. Charles M. Stedman, for defendant.

AVERY, J.: If the Legislature had the power to grant or to delegate the authority to a municipality to grant the exclusive privilege of constructing a track or running a street-railway on particular streets, we find nothing in the charter of the city of Asheville, or that of the plaintiff company, that can be fairly construed as an attempted exercise of such power either directly or through the medium of its agent. The charter conferred on the plaintiff all of the powers and privileges granted to the street-railway of Fayetteville, etc., and "such other privileges as may be granted by the municipal authorities of Asheville, in the county of Buncombe aforesaid." Clearly, this language clothed the municipality with no new or additional power, but authorized it only to exercise such authority as it already possessed for the furtherance of the objects for which the company was chartered. It is familiar and elementary learning that the authority of municipal corporations is restricted to such powers as are expressly granted by their charters, or such as arise by fair implication out of or as are necessary to the exercise of those granted. 1 Dillon Corp., sec. 89 (55); 2 Dillon, sec. 695. It is needless, therefore, to discuss the question whether the Legislature had the authority to do what it did not attempt to do. The judgment of the Court below is Affirmed.

MARTHA SMITH, Administratrix of Joseph Smith, v. NORFOLK & SOUTHERN RAILROAD COMPANY.

Action for Damages—Injury Resulting in Death—Railroads—Duty of Engineer to Keep Lookout—Person on Track—Drunkenness—Negligence—Contributory Negligence—Proximate Cause of Injury.

1. It is the duty of a railroad company in running its trains to keep a lookout on its track in order to discover and avoid any obstructions that may be encountered thereon, and if by reasonable watchfulness on the part of the engineer he might discover a person on the track in a perilous position and apparently insensi-

ble to danger, in time to avoid injury, and the engineer fails to keep such lookout and by reason thereof injury results, the railroad company is guilty of negligence for which an action may be maintained, provided that the person injured has not been guilty of contributory negligence.

2. In the absence of imminent danger the mere going upon the track is not contributory negligence but it is the duty of a person to look and listen for the approach of the train, and if, by his failure to exercise such care, a collision occurs he will be deemed guilty of such contributory negligence as would bar an action for the injury.
3. It is an elementary principle that intoxication will never excuse one for a failure to exercise the measure of ordinary care and prudence which is due from a sober man under the same circumstances; a person cannot thus voluntarily incapacitate himself from ability to exercise ordinary care and then set up such incapacity as an excuse for his negligence; therefore, where the breach of duty on the part of the defendant consisted simply in a failure to discover an intoxicated person lying on its track in time to avert injury, the negligence of such person continues, as in the case of a sober man, up to the moment of the collision, is concurrent with, if not indeed subsequent to, that of the defendant, and thus, being a proximate cause of the accident, constitutes contributory negligence which bars a recovery. It would be otherwise if the engineer, knowing or having reason to believe that such person was lying helpless on the track, failed to use all the means in his power to avoid the injury.

(Discussion by the Chief Justice of the rule in *Davies* v. *Mann*, in its relation to contributory negligence and the issues that should be submitted; also of the duty of railroads, in running trains, to persons on the track who have been stricken down by visitation of Providence, to children of tender age and others).

Associate Justices AVERY and CLARK, dissenting, *arguendo.*

ACTION for damages for the negligent killing of plaintiff's intestate by the defendant company, tried before *Bynum, J.*, and a jury, at Spring Term, 1893, of WASHINGTON Superior Court.

The issues submitted to the jury and the responses were as follows:

"1. Was Joseph Smith killed by the negligence of the defendant? Answer, Yes.

"2. Did the said Joseph Smith, by his own negligence, contribute to his own death? Answer, Yes.

"3. Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury? Answer, Yes.

"4. What damage, if any, is the plaintiff administratrix entitled to recover? Answer, $1,000."

It was in evidence that the engineer blew the locomotive whistle for the crossing and in a few minutes blew it again, the brakes were applied and the train stopped. The train, which was a long one, was running thirty or forty miles an hour according to one witness, and twenty or thirty according to another. There were besides the locomotive ten or twelve box and flat-cars in front, then the second-class car and then a first-class car. When the train stopped the remains of the deceased were under or opposite to the car in front of the second-class car. There were no air-brakes, but the brakes in use were good ones.

It was in evidence that deceased was addicted to the use of liquor and that he had been drunk for several days prior to his death, one witness saying that two hours before his death deceased was "crazy drunk." Another man was found lying drunk a few feet from deceased; an engineer by keeping proper lookout on the track might have seen a man's head on the track two hundred or three hundred yards distant.

The engineer testified for the defendant that upon seeing an object on the track at a distance of about one hundred and fifty yards he blew distress whistle to make it get off, blew for brakes, reversed the engine and used steam brake on engine, continuing to blow the distress whistle; that he discovered it to be a man, but could not stop the train before it ran over deceased; whistles were blown but the man did not move. As soon as he saw the man did not move the engineer blew whistle and applied brakes and the train slackened.

On cross-examination the engineer said: "It was about one hundred and fifty yards from the crossing to where deceased was killed. I blew for first crossing one hundred and fifty yards back; saw object as I was going over the last crossing. I felt the jar of the brakes. Had two brakemen and fourteen cars in all. There were no brakes on the flat-cars; was running about twenty miles an hour; when train ran over deceased it was running about four miles an hour. I could not stop the train at speed I was running in less than one hundred and fifty yards; if I had had air-brakes I could have stopped. Ordinarily trains like the one I was in charge of have hand brakes."

Other witnesses testified to the sharp and quick blowing of the distress signals and that the train was stopped quickly by the brakes.

His Honor instructed the jury (among other things) as follows:

"It is the duty of the engineer or fireman in running the train to keep a lookout in front of the train to see objects on the track in order to avoid accidents, and if they fail to do so this failure is negligence on the part of the company, and if an injury results from a failure to keep this lookout the company will be liable; and if you find that the plaintiff's intestate was run over by the train of the defendant and killed because of a failure of the officers in charge of and running the train to keep this lookout and see deceased lying on the track, it would be negligence, and you will answer the first issue, 'Yes.'

"If you find the facts to be that, by reasonable diligence in keeping a lookout, the engineer could have seen the deceased lying on the track in time to have stopped the train before it ran over the deceased and he did not stop it, it would be negligence, and you will answer the first issue, 'Yes.'

"The fact that the defendant did not have air-brakes on the train is not negligence.

"It was the duty of the defendant to have sufficient brakes and appliances to have stopped the train in emergencies of this character in a reasonable distance, and if you find that the brakes were not sufficient for that purpose it would be negligence, and if the deceased came to his death in consequence of this fact, you will answer the first issue, 'Yes.'

"It is insisted by the defendant that the train was properly equipped and manned for trains of the character of this one, being a mixed train of passenger and freight cars. The plaintiff insists that two brakemen to fourteen cars was insufficient. This is a question for you. If you find from all the evidence in this case that two brakemen and the steam brake on the engine were sufficient to properly run the train and control it, then the failure to have more is not negligence; but if you find from all the circumstances, growing out of this evidence as you find it to be, that two brakemen, the steam brake on engine and the number of brakes you find were on this train were insufficient to properly run and control it, then the failure to have a sufficient number would be negligence in the company.

"If you find that the train could have been stopped with the appliances with which it was equipped after the deceased could by reasonable diligence have been seen, and it was not stopped, but ran over deceased and killed him, it would be negligence, and you will find the first issue, 'Yes.'

"The question for you as to the outlook is not whether the engineer *did* see the deceased lying on the track, but whether he could by the exercise of reasonable diligence have seen him; and if he could by reasonable diligence have seen him in time to stop the train, but did not in fact see him in time to stop it, it would be negligence.

"If you find the engineer kept a lookout and saw the deceased lying on the track as soon as he could have seen him and immediately used all the appliances he could control in order to stop the train and could not do so, it would not be negligence, and you will answer the first issue, 'No.'

"If you answer the first issue 'No,' you need not answer the others, for unless the deceased came to his death by the negligence of the defendant the plaintiff cannot recover.

"If you answer the first issue 'Yes,' I instruct you to answer the second issue "Yes," if you believe the evidence in this case.

"If you answer the first and second issues 'Yes,' then come to the third. On this issue the same law is applicable that I have laid down to you as applicable to the first, and the facts that would constitute negligence under the first issue would constitute negligence under the third issue; so that if the facts proven satisfy you that the defendant was guilty of negligence and you answer the first issue 'Yes,' it will be your duty to answer the third issue 'Yes.'

"If you answer this issue 'No,' then you need not consider the question of damages, because the plaintiff would not be entitled to recover damages; but if you answer the first three issues 'Yes,' then you will consider the fourth issue, for although the deceased may have contributed to his own death by his own negligence, still if the defendant could by reasonable care have stopped its train, and not run over and killed him, the plaintiff would still be entitled to recover."

The defendant excepted to the charge delivered by the Court, and assigned the following errors:

"1. The charge assumes that the defendant failed to keep proper lookout on its track to avoid the accident, and did not properly leave the question to the jury.

"2. In the instructions on the third issue that 'the same law is applicable to it as the first and the same facts that would constitute negligence on the first issue would constitute negligence on the third issue; so that if the facts proven satisfy you that the defendant was guilty of negligence and you answer the first issue 'Yes,' it will be your duty to answer the third issue 'Yes.''"

There was judgment on the verdict for plaintiff, and defendant appealed.

Mr. A. O. Gaylord, for plaintiff.

Messrs. W. D. Pruden and *W. H. Day*, for defendant (appellant).

SHEPHERD, C. J.: 1. We are of the opinion that there should be a new trial upon the charge of his Honor on the third issue. This issue was intended to present to the jury the principle of *Davies* v. *Mann*, 10 M. & W., 546, and the jury were instructed that the same law and facts which would constitute negligence under the first issue would be applicable to the third issue. The evidence upon the first issue tended to prove negligence on the part of the defendant by reason of its failure to keep a proper lookout in order to discover the deceased in time to avoid the accident, and also because of its failure to properly equip the train by providing sufficient brakes and brakemen. Now, as the doctrine of *Davies* v. *Mann* is based upon some omission of duty occurring after the negligence of the deceased, *Gunter* v. *Wicker*, 85 N. C., 310 (which negligence was found by the Court on the second issue), it is plain that there was error in blending these two essentially different elements of negligence—the one existing prior and the other occurring subsequently to the negligence of the deceased—and applying them indiscriminately to the third issue. We cannot know upon what phase of the testimony the jury acted in determining the question of negligence upon the first issue, and we have just as much right to assume that, under the charge of the Court, they found that the negligence consisted simply in the failure to properly equip the train as that they predicated it upon the alleged failure to observe ordinary care in keeping a reasonable lookout, etc. Under the first view there can be no doubt that the finding upon the second issue would have barred a recovery; for if the engineer discovered the deceased as soon as he could have done so by keeping a proper lookout, and immediately applied all the means within his control to avoid the collision, and his failure to do so was by reason of the improper equipment of the train (an omission of duty which might have existed for weeks or months), then the negligence of the defendant would be no more proximate than that of the deceased, and there would be no ground whatever for the operation of the principle of *Davies* v. *Mann*. If this be not so, and the principle of that case is to be extended to negligence occurring both prior as well as that which is subsequent to the negligence of the deceased, it is perfectly useless to pretend that the doctrine of contributory negligence as to cases of this character has any place in the jurisprudence of this State. This inadvertence on the part of his Honor (and such alone do we consider it) affords the defendant a clear ground of new trial, and this would be equally true if, as suggested, the third issue had been omitted and the same instruction had been given on the first.

2. We are also of the opinion that there was error in ignoring that universally established principle in the law of contributory negligence which imposes upon one who has voluntarily disabled himself by reason of intoxication the same degree of care and prudence which is required of a

sober person. This is so well established that it would seem unnecessary to cite authority in its support, but as it appears to be questioned we will reproduce a few extracts from some of the text-books, which are substantially repeated by every writer upon the subject. Mr. Wood, in his work on Railways (Volume II, section 1457), after stating that one cannot voluntarily incapacitate himself from ability to exercise ordinary care and then set up such incapacity as an excuse for his negligence, remarks: "The rule, therefore, is that the same care is required of a person when he is intoxicated as when he is sober, though, if the defendant is aware of his state before the injury, it is bound to exercise greater care to avoid inflicting any injury upon him." In Patterson's Railway Accident Law, 74, it is said: "The fact that the person injured was intoxicated at the time of the injury will not relieve him from the legal consequences of his contributory negligence." In Bishop's Non-contract Law, 513, it is said: "Contributory negligence is the product of a general ill condition of the mind and not of a specific intent. Therefore, on principle, drunkenness does not excuse it, and so, also, are the authorities." In 1 Thompson on Neg. (430) the author remarks: "Nor will the self-inflicted disability of drunkenness excuse the wayfarer from the exercise of such care as is due from a sober man." In Shearman & Redfield on Neg. (1 Vol., 93) it is said in effect that if the intoxication is such that it prevented the injured person from taking ordinary care to avoid the injury he cannot recover." See also, Pearce on Railroads, 295; Whitaker on Negligence, 403, note; 4 Am. and Eng. Enc., 79. In Beach on Cont. Negligence (403), it is said: "Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we instinctively concede to blindness, or deafness, or any other physical infirmity. * * * Disabilities, more-over, of any kind are to be a shield and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blameworthy upon the part of a sober man, but that held the same conduct on the part of the same man, when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis.* When they make themselves drunk, and in that helpless condition wander upon the premises of sober men and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence; and the Courts consistently hold that such intoxicated trespassers (the notes show that the author is speaking of railroad accidents) have no standing in any forum where justice is impartially administered. These authorities, supported by a multitude of cases cited in the notes to the various text-books, establish beyond all controversy that the deceased under the circumstances of this case (that is, not having been discovered by the engineer in time to avoid injury) is to be treated, up to the moment of the collision, as a sober man, and that his helpless condition is not to be assimilated to those cases where the disability has not been self-imposed, and where the helpless condition is treated as a remote cause of the injury by reason of previous negligence or the visitation of Providence. Of course if the engineer knew, or had reason to know, of his helpless condition in time to stop the train and avoid the injury, and failed to do so, he would be guilty of such reckless conduct as would subject him to the punishment of the criminal law, as well as impose a civil liability upon the railroad company. This principle, as we have stated, is peculiar to the self-imposed disability of intoxication, and is as firmly fixed in the law of negligence as it is, as a general rule, in the criminal law of the land. That this is so is evident from the fact that after the most industrious research there cannot, it seems, be found in the entire annals of English or American jurisprudence a single decision at common law (nor have we seen any under a statute) in which a recovery has been permitted for injuries inflicted along the line of the road under the circumstances of this case. Even in Missouri and Texas, where perhaps the most advanced doctrine obtains, it has been decided that the action cannot be maintained-unless the engineer knew, or had reason to know, of the exposed and unconscious condition of the deceased. *Yarnall* v. *Railroad*, 75 Mo., 575; *Houston* v. *Symkins*, 54 Texas, 615. See also, numerous cases cited in the notes to *Kean* v. *Railroad*, 19 Am. and Eng. R. R. Cases, 321. In the Texas case it will be noted that the Court distinctly held that it was the *duty* of the engineer to keep a lookout to avoid injury even to trespassers, yet a new trial was granted on the ground that it was not left to the jury to determine whether the injured party was intoxicated or was suffering from a Providential visitation, "a fit." If his lying on the track insensible to danger was due to the former and not to the latter cause, it was declared that the plaintiff could not recover. It may be further observed that this case is cited as an authority in *Troy* v. *Railroad*, 99 N. C., 298, and it is remarkable that even in the two States where it is said the doctrine of comparative negligence obtains this action could not be maintained. *Railroad* v. *Cragin*, 71 Ill., 177; *Railroad* v. *Bell*, 70 Ill., 102; *Railroad* v. *Riley*, 47 Ill., 514; *Railroad* v. *Hankerson*, 61 Ga., 114. We are unable to understand how, upon principle, the case of one who is asleep on the track can be assimilated, as argued, to that of the self-imposed disability of intoxication, which, as we have seen by all of the authorities, stands upon its own peculiar ground. Being on the track is not itself negligence (Troy's case). and if such a person is unexpectedly overcome by sleep his disability cannot be said to have been voluntarily and self-imposed. Neither are we able to see how the case of a deaf mute walking on the track can be likened unto that of a person who is lying there stupefied by strong drink. A high degree of care is required of one who is deaf and who places himself in a position of known danger; still, if the engineer can by reasonable diligence discover him on the track, and also his insensibility to danger, the disability being involuntary, he is entitled to recover.

Nor can we perceive any similarity between the intoxicated man and a cow that has strayed upon the track, the cow, of course, not being the author of its insensibility to danger, and the owner really guilty, as held by this Court, of no negligence whatever in turning his cattle out to graze.

The principle of which we are speaking has never been denied by this Court as a distinct ground of decision, though the case of a drunken man was used in Deans' case (107 N. C., 686), as one of the illustrations of certain very important principles in the law of negligence, which it will be seen hereafter we fully approve.

The point did not arise in that case, as it was not found or admitted that the deceased was intoxicated, and the ruling below was simply to the effect that upon the whole testimony the defendant owed no duty to look out and discover trespassers upon the track, and therefore was not guilty of negligence. The ruling of his Honor was regardless of the fact whether the deceased was drunk or sober, and it was necessary that this Court should declare the duty of railroad companies as to persons on the track at places other than crossings, and also to discuss the doctrine of contributory negligence in its relation to the principle commonly called the rule in *Davies* v. *Mann*. The language used in the opinion is as follows: "If the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being who is known by him to be insane or otherwise insensible to danger or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means short of imperiling the lives of passengers on his train to stop it." From this language it might be inferred that the duty of the engineer begins only upon the discovery of the person in danger; for until he does discover him the duty of resolving all doubts in favor of his preservation from danger cannot very reasonably arise. Taken, however, in connection with other parts of the opinion and the declaration of the Court in subsequent cases, it cannot be doubted that it was intended to declare the duty of keeping a proper lookout for all persons who may be on the track. The declaration, however, of a duty and the effect of intoxication in contributory negligence are very different things, and the latter question was, for the reasons above mentioned, not presented to the Court. It is true that from the opinion it might be inferred that intoxication, if it had been found as a fact, would have excused the negligence of the deceased, but, as we have said, this particular point was not decided, nor do the authorities cited in the opinion support this view. Let us examine these cases:

In *Railroad* v. *Smith* (52 Texas, 179) the injury was inflicted upon a man who was walking upon the railroad track and was negligent. He was held under the circumstances to be guilty of contributory negligence, and it is to be noted that there was evidence tending to show that he was intoxicated.

In *Railroad* v. *Miller* (26 Mich., 279) the action was brought for injuries received by the plaintiff in a collision between a locomotive and the wagon in which the plaintiff was riding. There was nothing in the case about intoxication, but in the course of his learned opinion Judge CHRISTIANCY, in discussing the general subject of negligence, remarked that if the engineer "sees" a person in peril on the track whom he has reason to believe to be badly intoxicated, or otherwise insensible to danger, he must use all the means in his power to stop the train and avoid a collision.

In *Railroad* v. *St. John* (5 Sneed, 504) the accident complained of was to a child eight years of age, and in *Weeks* v. *Railroad*, 56 Cal., 513, the accident was to a child six or seven years of age. In neither of these cases was the effect of intoxication discussed, and they were evidently cited for the purpose of sustaining the rule imposing the duty upon the engineer of keeping a lookout for persons along the line of the track, and upon that question they are in point.

To the same effect is the much-cited case of *Isabel* v. *Railroad* (27 Conn., 393), but as bearing upon the particular question under consideration it may be noted that the action was brought for the killing of cattle straying upon the track, and that the duty which the law imposes upon an intoxicated person was in no way involved in the decision. The following language, however, appears in the discussion of the general subject: "Or, an intoxicated man is lying in the traveled part of the highway, helpless if not unconscious: must I not use care to avoid him? May I say that he has no right to encumber the highway, and therefore carelessly continue my progress, regardless of consequences? Or, if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of a field, *knowing* the fact, continue to mow on or fell trees, as if it was not so? Or, if the intoxicated man has entered a private lane or by-way and will be run over if the owner does not stop his team which is passing through it, must he not stop them?" We have quoted the entire paragraph, so that it can be readily seen that this *dictum* (and it is nothing more) really means what we all concede—that if such an intoxicated person is discovered it is a duty dictated by humanity as well as the law to avoid inflicting an injury upon him. If this is not so, what meaning is to be attached to the words "carelessly *continue* my progress," "*knowing* the fact," and "does not *stop* them"?

When Mr. Wood (2 Vol., 1464) speaks of the duty which is due to persons lying on the track in connection with a child or an animal, he very clearly did not intend to say that when a drunken man is not discovered he is to be absolved from the consequences of his own negligence, as the only case he refers to of persons lying on the track is the case of *Meeks* v. *Railroad, supra,* where a child lying on the track was run over and injured. That he did not mean that a drunken man would be excused from exercising the same care that is required of a sober man is evident from his explicit statement of the contrary doctrine, which we have heretofore quoted and which is sustained by all of the authorities. This is also perfectly manifest from the fact that on the very next page he quotes with approval that part of the opinion in *Railroad* v. *Miller, supra,* which contains the language of Judge CHRISTIANCY to which we have referred, and which indicates that the railroad company is only liable for the failure of duty after the discovery of the drunken man. The author says: "And this we believe is an accurate statement of the duty of railway companies under the circumstances referred to."

It is manifest from this examination that these cases do not sustain the proposition that an intoxicated person is absolved from the duty of exercising ordinary care, and it is but proper to say that they were probably cited for the purpose of sustaining the general principles laid down in the extract which we have quoted. Having shown, we think conclusively, not merely by the weight but by the entire course of judicial opinion, that the self-imposed disability of intoxication affords no more excuse in the law of negligence than it does in the criminal law, we cannot understand how we could be justified in the abrogation of this principle which has stood for centuries simply by reason of what may be implied from the language of an opinion in a case that did not distinctly raise the question. This, it seems to us, would not be following the doctrine of *stare decisis*, and the argument that a Court can arbitrarily reject a fundamental principle of law by calling it a fiction is, we think, wholly inadmissible. If we can do this there is no reason why the same principle may not be rejected as a fiction in the criminal law, and, indeed, we do not see why we could not dispose of any other well-grounded rule of law in the like summary manner. The supposed analogy with the principle of equity which relieves a wholly intoxicated person against the consequences of his contracts cannot be supported. Equity shields him in such cases when he has been imposed upon by reason of such incapacity, but neither equity nor law ever converts intoxication into a sword by means of which a drunken man can make a profit out of his self-imposed disability when a sober man under the same circumstances would be entitled to no relief. It would, as Mr. Beach says, be a strange law that would enable a drunken man to recover when under the same circumstances a sober man would be denied all redress; and there certainly can be no more inhumanity in denying a recovery to one who, by an act done in his intoxicated condition, might probably contribute to the wrecking of a train and the destruction of the lives of passengers, than to hang a man for a murder committed while wholly unconscious of his act by reason of the influence of strong drink. The law does not treat such unfortunate persons who may be on the track as outlaws. On the contrary, this Court and several others have declared it to be the duty of the engineer to keep a vigilant lookout for them and all other persons, but when he fails to discover them by the omission of ordinary care (and this is the measure of his duty—Deans' case, *supra; McAdoo* v. *Railroad*, 105 N. C.) there would seem to be no injustice in denying a recovery to one who has voluntarily stupefied his senses so as to be unable to provide for his own safety. The engineer is running a train over his own right of way, and by an inadvertence which amounts simply to the failure to use ordinary care fails to discover a person who really has no right to be on the track and who he cannot reasonably anticipate will make it a place of drunken repose. The engineer when he discovers the man uses every means in his power to avoid the injury; the man, had he been sober, could easily have escaped, but by reason of the self-imposed disability of intoxication makes no effort to do so. Can there be anything wrong in refusing to cast upon the defendant the whole responsibility of the collision and making it pay for an accident which would not have happened had the deceased been sober, and for which had he been sober he could not have maintained an action? The law is just as well as humane and denies a recovery under such circumstances. Such has always been the law both in England and America; it has been approved by such great jurists as RUFFIN, NASH, PEARSON, and their distinguished successors, and we feel that we are treading upon safe ground when we follow in their footsteps.

If the Legislature sees fit to change the law in this respect it has the power to do so, but we do not think that so radical a change in the law of negligence should be wrought by what we cannot help thinking would be "judicial legislation" of the most pronounced character.

As we have already intimated, the fact that the elementary principle referred to seems to be seriously disputed is the only reason we have said so much in its support, as we believe it to be established beyond all question by the consensus of judicial decision as well as the opinion of all of the authors upon the subject. If, then, the same degree of care is required of the deceased "as is required of a sober man under the same circumstances" it is plain that his negligence was concurrent with that of the engineer, and he was therefore guilty of contributory negligence. McAdoo's case, *supra*, and the authorities cited. Indeed, as we shall hereafter see, his negligence, operating as it did up to the moment of the collision and after the decisive negligence of the engineer, was really subsequent negligence and goes far beyond what is sufficient to bar a recovery. Had the deceased been looking and listening as he was required to do, he would have had ample time to have escaped from his peril after the engineer had passed the point when his efforts would have been unavailing to save him. Under this view, he being in contemplation of the law able to avoid the consequences of the prior negligence of the defendant, it would seem that, if the train had been injured by the obstruction, his negligence would have been the proximate cause of the accident, and the defendant and not the deceased would have been entitled to recover. A sober man, as we have seen, very clearly could not have recovered, and is a premium to be offered to negligence caused by the self-imposed disability of drunkenness, which prevents one from using ordinary care by looking and listening for the approach of trains which he is bound to know the defendant has a right to run and will run over its own property in the pursuit of its legitimate business? In this case there is a total absence of testimony tending to show that the conduct of the engineer was wanton or willful, and his testimony to the effect that he sounded the alarm and applied the brakes and used all other means under his control to avoid the accident, as soon as he discovered the deceased lying on the track, is wholly uncontradicted. The action, then, being founded upon the failure to use ordinary care is subject, of course, to the defence of contributory negligence, and we cannot conceive of a plainer case than the one now before us.

We feel very sure that his Honor's failure to apply the principle which we have been discussing entitles the defendant to a new trial.

3. While the foregoing considerations are, in our opinion, sufficient to dispose of this appeal, we deem it our duty, in view of the argument of counsel, to express our approval of certain general principles laid down in Deans' case, *supra*, and also our views as to how they should be applied. Leaving, then, the facts of this particular case behind us, we will state that one of the principles referred to is that which imposes upon the engineer of a railroad train the duty of keeping a vigilant lookout on the track in order to discover and avoid any obstructions that may be encountered thereon. This duty is due to the passengers and, when consistent with the necessary attention of the engineer and other employees on the engine to its safe and proper management, the duty is likewise due to the owner of cattle running at large, to the owner of other property, which under certain circumstances may be on the track, and also, as a general rule, to persons who may be on the same at places other than crossings. When under the particular

circumstances of a case such property or persons may, by the exercise of ordinary care, be discovered in time to avoid a collision, the failure to exercise such ordinary care is negligence and the plaintiff will be entitled to recover unless he has been guilty of contributory negligence. Of course, where a person is discovered and is apparently not unconscious of danger it is to be presumed that he will observe ordinary caution and the engineer is not required to stop the train. Although this principle as applied to persons on the track does not generally prevail, there seems to be a growing disposition on the part of the Courts to recognize it as a common law duty, and in Georgia and Tennessee it has been imposed by statute. In Tennessee, however, it was said by Lurton, C. J. (*Patton* v. *Railroad*, 89 Tenn., 370; see also, St. John's case, *supra*), that such is the law without reference to the statute, and he quotes with approval the language of Mr. Wood, who says "that a railroad company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury." 2 Wood R. Law, 1267. This language is also quoted with approval by the Supreme Court of West Virginia and a recovery was sustained upon the same principle for injuries to a child trespassing upon the track. *Gunn* v. *Railroad*, 14 S. E. R., 465. To the same effect is *Meeks* v. *Railroad*, *supra*, and other cases. This ruling on our part is supported by the plain intimation, if not indeed the decision of this Court in *Troy* v. *Railroad*, *supra*, in which it is said that a person walking upon a railroad track is not guilty of contributory negligence *per se*, nor does such a "technical" trespass relieve the railroad company of the duty of exercising ordinary care to avoid the infliction of injury, provided such person after he gets on the track does nothing "positive or negative to contribute to the immediate injury." The Court adopts the principle laid down in the leading case of *Railroad* v. *Simpkins, supra,* and it may be well to reproduce an extract from the opinion in that case. The Court said: "In our opinion there is a distinction between the duty devolving on the owners of land on which there is a dangerous excavation and that devolving on a corporation invested by law with the extraordinary power of traversing the country with huge cars whose progress is everywhere attended with danger. They who place such dangerous machines in motion should, we think, be required to take precautions against their injuring any one who may happen to be in their pathway. 'The care in conducting any business should be proportionate to its dangerous nature.' *German* v. *Railroad,* 26 Wis., 448. The extent of the precautions required of a railroad company depends on all the circumstances. The regulations of railroads exact watchfulness of the engineers, and this rule should operate for the benefit of the public as well as the company. Authorities are not lacking in support of the position that a 'reasonable lookout,' varying according to the danger and all the surrounding circumstances, is a duty always devolving on those in charge of a train in motion. *Railroad* v. *State,* 36 Md., 366; *Harland* v. *Railroad,* 65 Mo., 22; *Hicks* v. *Railroad,* 64 Mo., 430. The duty of watchfulness has often been enforced against railroads in cases of injuries to cattle trespassing on their tracks, and that, too, in the absence of any statutory provision or in cases outside of the statute. We prefer that line of decisions holding railroads bound to exercise their dangerous business with due care to avoid injury to others as correct in principle and sound in policy, and as protecting even a trespasser who is not guilty of contributory negligence." These principles, when applied with a proper regard to the defence of contributory negligence, commend themselves to our judgment as just as they are humane, and they are especially applicable to railroads operating within our State, where, as a matter of common knowledge, the use of their tracks by pedestrians is tacitly acquiesced in. We can see no hardship in exacting this duty of engineers and holding their principals responsible when they fail to exercise due care in discovering and avoiding injuries to helpless persons between crossings, who are in plain view upon their tracks; and this is really the duty imposed upon them in such cases. As we have stated, this duty has been established by several decisions of this Court, and at the present Term we enforced it in the case of an injury to a child of tender years, who could, by the exercise of ordinary care, have been discovered by the engineer. *Bottoms* v. *Railroad.* We see no reason to reverse our former rulings upon this important subject simply because in some of the other States a contrary doctrine is held. We believe that they are founded upon principle as well as respectable authority, and for these reasons as well as a due regard to the doctrine of *stare decisis* we should adhere to the principles therein enunciated.

4. We have thus dwelt upon the existence and nature of this duty because it is impossible to discuss the doctrine of contributory negligence, even to a limited extent, unless we have a clear conception of this constituent element, as well as of other terms and definitions relating to the subject. Indeed, it may be safely remarked that no science is more dependent upon the accuracy of its terms and definitions than that of the law. Looseness of language and *dicta* in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law, or themselves become crystallized into a

kind of authority which the Courts, without reference to true principle, are constrained to follow. These observations are particularly applicable to the doctrine of contributory negligence and especially in its relation to what is generally called the rule of *Davies* v. *Mann*. All along the highway of judicial decision we find it so strewn with the wrecks of overruled cases, exploded *dicta* and condemned or qualified expressions that we are inclined to sympathize with the despairing remarks of Judge THOMPSON that "the whole subject of contributory negligence remains in a state of great confusion and uncertainty." 2 Vol. Neg., sec. 7. Mr. Beach, Mr. Patterson and some other writers attribute much of this obscurity to improper definitions of the rule in *Davies* v. *Mann*, and we think with them that it is simply a means of determining whether the plaintiff's negligence is a remote or a proximate cause of the injury. Before the introduction of the rule any negligence on the part of the plaintiff, which in *any degree* contributed to the accident, was juridically treated as a proximate cause, and constituted contributory negligence which barred a recovery. *Dowell* v. *Nav. Co.*, 5 El. & Bl., 194. Several reasons have been assigned in support of this principle, one of which is that a court of law, unlike a court of admiralty, has "no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief," and therefore if the plaintiff were allowed to recover "it might be that he would obtain from the other party compensation for his own misconduct." 2 Thompson Neg., 1146—1154. This was considered a harsh rule, as it left the plaintiff to bear all the damages although he may have been but remotely, and consequently but slightly, in fault. The doctrine, however, was qualified by the ruling in *Davies* v. *Mann*, and it was determined that although the plaintiff was guilty of a want of ordinary care in contributing to the injury, yet this would not prevent him from maintaining an action if the defendant might have avoided the injury by the exercise of ordinary care on his part. Much confusion, as we have seen, has resulted in the application of this principle and it has been claimed to be authority for the doctrine of comparative negligence, and it has also been criticised as practically abolishing the doctrine of contributory negligence altogether. A very reasonable explanation of it is made by Mr. Patterson, however, who says: "The rule has been misunderstood and misapplied. It means only that that negligence upon the part of the plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury and that it is not a proximate but only a remote cause of the injury, when the defendant, notwithstanding the plaintiff's negligence, might by the exercise of ordinary care and skill have avoided the injury. Thus stated, the rule is consistent with the theory upon which the doctrine of contributory negligence is based and furnishes no support for that of comparative negligence." Patterson Railway Accident Law, 51.

Mr. Beach expresses the same view and adds that "the attempts of the Judges to ring a new change, or to find some novel and original phrase in which to express the rule that whenever the negligence of a plaintiff proximately contributes to cause the injury for which he seeks to recover damages he has no cause of action, has thrown the law into confusion." Contributory Negligence, p. 33; Pollock Torts, 295; Bishop Non-contract Law, 459; 2 Wood, 1447; Wharton Neg., 323; 4 Am. and Eng. Enc., 18, 19, 27, notes. It must also be observed that shortly after the decision of *Davies* v. *Mann* Lord CAMPBELL, in 5 El. & Bl., 195, understood the doctrine to be the same as stated above. These views have been distinctly adopted by this

Court in several cases and are well expressed in *Farmer* v. *Railroad*, 88 N. C., 564, in which Mr. Justice ASHE states that whether the plaintiff was guilty of contributory negligence depends upon whether his act "was a proximate or a remote cause. If the act is directly connected so as to be concurrent with that of the defendant, then his negligence is proximate and will bar his recovery; but where the negligent act of the plaintiff precedes in point of time that of the defendant, then it is held to be a remote cause of the injury and will not bar a recovery, if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant." Thompson Neg., 1157, note 8; *Gunter* v. *Wicker, supra; Doggett* v. *Railroad*, 78 N. C., 305; *Roberts* v. *Railroad*, 88 N. C., 560. Thus it appears that where the doctrine of *Davies* v. *Mann* is applicable it *excludes* contributory negligence, and if this be so it would be confusing to say that notwithstanding the contributory negligence of the plaintiff he may, nevertheless, recover if the defendant could by ordinary care have avoided the injury. Whether a third issue should be submitted is a matter addressed to the discretion of the Judge, but when he does submit such an issue it will avoid dispute as to the meaning of terms to omit the word "contributory." This is in accord with the suggestion of Mr. Justice AVERY in the well-considered opinion in *McAdoo* v. *Railroad, supra.*

Recurring, however, to the main question, it becomes important to determine what is a proximate cause within the meaning of the rule, and it was to this point that the learned argument of counsel for the defendant was chiefly addressed. In *Farmer* v. *Railroad, supra*, and the authorities cited it will be seen that this depends upon whether "the negligent act of the plaintiff *precedes in point of time* that of the defendant," and this is the view, according to

Judge THOMPSON, which is supported by the weight of English and American authorities. 2 Vol. Neg., 1157. Counsel insists that until the actual discovery of the person apparently in danger the negligence of such person cannot be said in a legal sense to precede that of the defendant, and therefore unless the injury could have been avoided by the exercise of ordinary care after such discovery the plaintiff has no cause of action. It must be manifest that, if this is the correct view, the rule in question would have but little room for application, for when an engineer actually sees a person apparently insensible to danger and fails to use ordinary care to avoid his injury he is guilty of such a reckless and wanton disregard of human life that his conduct is so far regarded as willful as to practically place him entirely outside of the law of negligence. Beach, *supra*, 55. Many cases were cited by counsel in support of his proposition, but on examination it will be seen that they come from States where the duty of the engineer to anticipate and keep a lookout for persons along the line of the road is not imposed. The failure to advert to the non-existence of this duty is but an illustration of one of the many ways by which the doctrine of negligence is confused. In speaking of such decisions a discriminating writer remarks: "But these cases may rest on the principle that it is no want of ordinary care not to look out for persons where they have no right to be," and it is to be noted that Judge THOMPSON's "discovery clause," as Mr. Beach disapprovingly calls it (Cont. Neg., 55), seems to be based in part upon this very idea. Neg., 1157, sec. 7. Judge THOMPSON, however, very candidly admits that his view is not sustained by the weight of authority and, after stating that "the practitioner is concerned to know the conclusion of the Courts rather than the views of writers," proceeds to lay down the rule which omits the discovery feature and which has been literally adopted by this Court in Farmer's case, *supra*, and many others.

That a discovery of the danger is not necessary to make the negligence of a plaintiff the proximate cause of the injury is evident from the case of *Butterfield* v. *Forester*, 11 East, 60, the earliest decision upon the subject of contributory negligence, as the negligence there which defeated a recovery was the failure of the plaintiff by the exercise of ordinary care to discover and avoid a collision with an obstruction which the defendant had negligently placed in the street of Derby. So, on the other hand, in the case of *Davies* v. *Mann*, it did not appear that the defendant discovered the historic donkey fettered upon the highway, and it seems that the failure to discover and avoid him was the true ground of the action. It is also to be remarked that in the first case in which the principle of *Davies* v. *Mann* was applied by this Court it did not appear that the defendant saw the plaintiff in the place of danger, and it was held that although the plaintiff was negligent, yet it was previous to that of the defendant, who by the exercise of ordinary care might have avoided the injury. *Gunter* v. *Wicker*, *supra*. We think that a plain and simple statement of the rule is to be found in the work of Shearman & Redfield on Negligence, Volume I, section 99. It is that "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." This is entirely consistent with our doctrine, as the negligence of the party injured in such a case may well be considered to have preceded that of the defendant in point of time. See Cooley on Torts, 70, 71, which is cited and commented upon in *Clark* v. *Railroad*, 109 N. C., 449; Bishop Non-contract Law, 463.

This view is but another way of stating the principle that "where the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have *discovered* the carelessness of the person injured in time to have avoided its effects and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation." The foregoing extract is taken from the able article on Contributory Negligence in the American and English Enc., 4th Vol., 27, and is sustained by *Tuff* v. *Warman*, 5 C. B., 573, and numerous authorities cited in the notes, and also by our own decisions.

Applying the rule which we have stated to accidents upon railroad tracks, it may be illustrated as follows: First, there must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout (consistent with other necessary duties in running the train) in order to discover and avoid injury to persons who may be on the track and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A, being on the track and after this decisive negligence, fails to look and listen and is in consequence run over and injured, his negligence is not concurrent merely but really subsequent to that of the engineer, and he cannot recover, as he and not the engineer has "the last clear opportunity of avoiding the accident." If, however, A is on the track (and here it may be remarked in passing that being on the track is not *per se* negligence, Troy's case, *supra*) and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A would be previous to that of the engineer, and the engineer's negligence would be the proximate cause, he, and not A, having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it, and there are other cases to which the principle is applicable.

These illustrations show how the rule of *Davies* v. *Mann* operates in cases where the primary duty is to keep a lookout and to discover, and the principle we have stated should be applied by the Courts to the various phases of fact arising upon the testimony, and juries should not be left to determine the case simply under the general language of the rule. This, it seems to us, is the only way in which the rule can be properly applied in the presence of a duty like that which is imposed upon railroad companies as to persons or property upon the track. To say that the principle of *Davies* v. *Mann* does not apply until the discovery of the danger is to practically abrogate the duty. It may be here observed that a recovery is permitted by a person who, being on the track when there is no immediate danger, is stricken down by the visitation of Providence, when he might have been discovered by the exercise of ordinary care. There being no negligence in such a case by simply going upon the track, there is no contributory negligence, and the same is true as to children of such tender years as to be incapable of discretion.

We have not attempted to discuss the law of contributory negligence in all of its aspects, and our chief object has been to meet the arguments of the able counsel, which were directed against the existence of the duty under consideration, and also the application of the principle of *Davies* v. *Mann* until the actual discovery of the danger. It has been suggested that when the engineer fails to exercise ordinary care in discovering persons on the line of the track he is not guilty of ordinary negligence, which all the text writers and our own Court time and again have declared is the legal effect of a want of ordinary care (McAdoo's case and authorities cited), but that his conduct is so willful and wanton that there can be no contributory negligence whatever. Under such a rule not only will railroads be made insurers against the consequences of the negligence of all persons trespassing upon their property, but even the engineer may be convicted of murder by reason of a mere inadvertence. It is hardly necessary to say that all of the decisions of our Court are against such a position, and this is the general current of authority. We think that in declaring the duty we have been considering this Court has gone as far as a reasonable exercise of its authority permits. If such a revolutionary change is to be made in the law of negligence, or rather if the law of negligence is to be altogether abolished in such cases, it should be done by the Legislature and not by the Court. *Jus dicere non dare.*

For the reasons given in the first two divisions of this opinion we think there should be a New Trial.

MACRAE, J.: I concur in the conclusion reached by the Chief Justice that there should be a new trial, but I do not concur in any expressions which indicate that there is a duty upon the defendant's servant, in the absence of reasonable ground of apprehension, to anticipate that a person, *sui juris*, will voluntarily expose himself to danger.

AVERY, J., dissenting: I concur with the Court in so far as the opinion adopts and approves the doctrine laid down in Deans' case, though the reasoning may not in all respects be in accord with my views. But I do not assent to the conclusion that railroad companies are relieved of liability for negligently killing a drunken man who is lying insensible upon the track, when under exactly similar circumstances a sober man, who had fallen asleep at the same place, would have the right to recover. I freely concede that the Court has found abundant authority and could have arrayed many more citations from text-books and decisions of other States to sustain its conclusion and justify the announcement that the *dicta* in a number of cases decided here should not be followed. But the same reasoning would warrant us in turning back the dial and not only overruling such *dicta* as that companies must use air-brakes on passenger cars, but many actual rulings based upon the idea that the definition of negligence under given circumstances is not fixed and immutable, but must be modified as we discover its want of adaptability to new conditions.

But it is urged, first, that railway companies owe no such duty to a man whose sleep is due to drunkenness as to one who soberly and deliberately yet carelessly lies down on the track; second, that in fact a drunken man, though sound asleep, is not excused by law for drunkenness but is deemed to be willfully remaining on the track and thereby co-operating consciously with the careless servant of a company in causing his own injury.

Applying the harsh doctrine of the criminal law, adopted and adherred to only in order to protect life, person and property from the consequences of fraud and violence, it is insisted that drunkenness is an aggravation rather than an excuse for carelessness as for crime. But, as far as it is consistent with the public safety to do so we find that the law follows the natural instincts of higher humanity and protects instead of punishing these unfortunates when their weakness has made them victims and sufferers instead of criminals.

The law lends its sanction to no such rule as that; where the conduct of a drunken man is neither criminal nor tortious he forfeits any right or remedy to which he would be entitled if sober. Discussing this doctrine, then, as enunciated by Lord PENZANCE, and conceding the possibility of the existence of a precedent contributory negligence, which does not defeat recovery as it would if concurrent with the negligent act of a defendant, the question arising here is whether the careless act of a drunken man who is already asleep upon the track when the engineer first has opportunity to see and understand his condition is guilty of concurrent contributory negligence. It is familiar learning that a deed or other written agreement executed by one so drunk as to be unconscious of what he was doing could be avoided even in a court of law under our former system. A contract to be valid must necessarily involve the intelligent assent of the mind of him who is to be bound by it, and it is for this reason that "total drunkenness is now held to be a complete defence" when an action is brought against him to enforce it. *Morris* v. *Clay*, 8 Jones, 216; *Cook* v. *Clayworth*, 18 Vesey, 12. "Where the intoxication rises to the degree which may be called excessive drunkenness where a party is utterly deprived of his reason or understanding when he enters into it," Justice STORY says that "equity will relieve against it because in such a case there can, in no just sense, be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature." 1 Story Eq. Jur., sec. 231.

The negligence of a drunken man, who has been insensible for some time, is not to be distinguished from the supposititious case of a man who has fallen asleep on the highway (put by Parke, B., in *Davies* v. *Mann* as giving a clearer right of action than the injury to the fettered ass), unless we concede by a fiction of the law the drunken man is deemed to be still concurring in taking the risk of exposure on the track, while the man, whose sleep upon the highway is induced by other causes, is held to have been guilty of precedent carelessness in going to sleep upon the track. If the learned Baron correctly applied his own illustration the negligence of a sober man who sleeps upon the highway is necessarily previous to that of him who drives over him after he is asleep.

"An intoxicated man" (said the Court of Connecticut by way of illustration in *Isbel* v. *Railroad*, 27 Conn., 393) "is lying in the traveled part of the highway, helpless if not unconscious, must I not use care to avoid him? May I say he has no right to encumber the highway and therefore carelessly continue my progress regardless of consequences?" Referring to this high authority Mr. Wood (2 Vol. Ry. Law, p. 1267, sec. 320) says: "The doctrine of this case has been approvingly cited by the Courts in several cases, and seems to us to define the true rule of duty and obligation resting upon railway companies as well as to persons lying upon their tracks, and young children as to animals. The rule may be said to be that a railroad company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as circumstances require to prevent injury to them. If a person seen upon the track is an adult person and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position, and if he fails to do so and is injured, the fault is his own, and there is, in the absence of willful negligence on its part, no remedy." In the same section that author (p. 1269) after citing the leading case of *Lake Shore Railroad* v. *Miller*, 25 Mich., 279, quotes from the opinion of Chief Justice CHRISTIANCY as follows: "If, however, he, the engineer, sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving good reason to believe that he is, insane or badly intoxicated, or otherwise insensible of danger or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not or would not, and he should therefore take means to stop his train in time." *Needham* v. *Railroad*, 37 Cal., 409. Of course numberless authorities can be cited against this position, and if they are as reasonable as they are numerous I would be constrained to yield to them.

From these authorities we gather the rules:

1. That it is the duty of railway companies to keep a reasonable lookout (at common law as well as where there is a statute).

2. That they owe this duty to trespassers upon the track as well as to others.

3. That if by keeping this reasonable lookout the engineer discover a person that he knows to be, or has good reason from his appearance to believe to be, badly intoxicated, he must use all the means at his command to stop the train.

These authorities therefore sustain our position in Deans' case, Clark's case and others that have followed in the same line, using almost the identical language that we are urged to modify. It will be seen that it occurred neither to the Supreme Court of Connecticut nor to Mr. Wood (who is one of the fairest of all American writers upon the law of railroad corporations) to draw a nice distinction between the duty of keeping an outlook for town trespassers and country trespassers, for sleepy men and drunkards.

The point to which our attention must be chiefly directed is whether the fault of the plaintiff's intestate was not only a contributory but a concurring and co-operative cause of the injury sustained. *Meeks* v. *Railway*, 56 Cal., 513; Cooley on Torts, p., 679, 683; *Tuff* v. *Harman*, 5 C. B. Reports, N. S., 573. And the settlement of it must depend greatly upon the question whether a helplessly drunken man is fictitiously held more capable of concurring and co-operating in or consenting to his own death than one who has fallen asleep under other influences.

It is needless to multiply authorities to meet the numerous citations offered by the Court. It is sufficient for me that this Court has declared that a company would not be relieved of the imputation of what would ordinarily be actionable carelessness on the part of its engineer because the victim of his negligence happened to be a slave to an unfortunate habit. If it is the duty of an engineer to see what by reasonable care he can see in his front, and to avoid injury that proper watchfulness would enable him to avert, we see no reason for counting the obsolete cases in musty digests to justify a nice distinction that commends itself neither to our sense of right and justice nor our reason. It is no more unreasonable to require an engineer to look out for the safety of a drunkard than for the protection of one who, in the full possession of his faculties, willfully lies down to sleep in a dangerous position. When a Court has laid down a principle that accords with the highest conception of what is morally right and is supported by some authority I cannot concur in acknowledging that it is our duty to go back and count and analyze the cases cited by the author relied upon in the Court to sustain us, in order to destroy the force of our own *dicta*, or overrule our settled decisions, unless the principle overruled has worked wrong and injustice in its enforcement.

It is not suggested or pretended that the best interests of society require that an engineer should be excused from culpability in killing a victim of intoxication who falls on the track in an unconscious condition, when if the same man had at the same place consciously incurred the risk of lying down to sleep the company would have become answerable in damages.

Following suggestions originating chiefly in *Meredith* v. *Iron Co.*, 99 N. C., 580, and *McDonald* v. *Carson*, 94 N. C., 500, and the plain intendment of the Legislature, this Court, in *Emry* v. *Railroad*, 102 N. C., 224, laid down the rule that the *nisi prius* Judge might in his discretion submit all or only a portion of the issues raised by the pleadings, provided those adopted were such as to afford opportunity to pass upon any view of the law arising out of the evidence, and were sufficient as a basis for the Court to proceed to judgment. This ruling has since relieved us of difficulty in many cases and promises to remove in the near future what has heretofore proven a fruitful source of controversy. The ruling upon this point has been approved in *Lineberger* v. *Tidwell*, 104 N. C., 510; *McAdoo* v. *Railroad*, 105 N. C., 151; *Bond* v. *Smith*, 106 N. C., 564; *Carey* v. *Carey*, 108 N. C., 271; *Waller* v. *Bowling*, 108 N. C., 295; *Blackwell* v. *Railroad*, 111 N. C., 153, and in several other cases. In *Scott* v. *Railroad*, 96 N. C., 428, it was stated by Chief Justice SMITH, delivering the opinion of the Court, that while two issues might be submitted, one embodying the question whether the defendant has been negligent, and another whether the plaintiff has been negligent, the same end might be attained by submitting simply the question, "Whether the defendant's negligence was the cause of the injury," and telling the jury if they found it due to the plaintiff's carelessness to respond in the negative. In *Kirk* v. *Railroad*, 97 N. C., 82, it was held error, after refusing to submit an issue as to contributory negligence, to give the instruction as suggested in Scott's case. In *McAdoo* v. *Railroad*, *supra*, while it was declared not to be error to submit either one issue involving the question of the defendant's negligence alone or that and an additional inquiry as to contributory negligence, it might help the jury to reach a satisfactory conclusion in cases where it was contended that some carelessness supervening after the previous negligence of the plaintiff was the proximate cause of the injury, to submit the issues substantially as follows: "1. Was the defendant negligent? 2. Did the negligence of the plaintiff contribute (not concur) in causing the injury? 3. Could the defendant by the exercise of ordinary care have avoided the injury, notwithstanding the previous negligence of the plaintiff?" That these are all questions which may be raised by the pleadings where an action is brought to recover damage for injuries alleged to have been caused by negligence and which are involved in all cases where a dispute arises as to whether the injury is due proximately to the fault of the one or the other of the parties, no one will venture to deny, since, adopting even the extreme view insisted on by defendant's counsel, that the subsequent negligence of the defendant must be willful, it is none the less a supervening cause of injury. Contributory negligence must be pleaded specially in the answer. Does not pleading it raise an additional issue? If the testimony tends to show that subsequent carelessness of defendant was the proximate cause of the injury complained of, proof of the allegation will excuse contributory negligence.

But it is insisted that all of these cases, too, must be overruled because, as is assumed, the Judge below was led into an illogical and erroneous charge by the suggestions of the Court in the opinions as to the possible or proper issues that might be submitted in actions brought for negligence.

The principle involved (and not the issues) was discussed in Deans' case, and the error consisted not in the form of the issues, but the failure of the Judge to submit any issues at all to the jury. The first issue submitted in this case was of itself sufficient, and if properly explained to the jury there is no reason why the response to it should not have been decisive of the controversy, except as to the question (*Denmark* v. *Railroad*, 107 N. C., 185) of the amount of damage, in the event of a finding upon it in favor of the plaintiff. But in the case before us it seems that the issues were framed in a peculiar manner, the first so as to involve not only the question of the defendant's negligence but that also of proximate cause. It was as follows: "Was Joseph Smith killed by the negligence of the defendant?" Not, as suggested in the cases criticised, "Was the defendant negligent or guilty of negligence?" While the third issue would lead to the very same result by eliciting an answer to the question whether the accident could have been averted by ordinary care on the part of the defendant, being in form as follows: "Could the defendant, by the exercise of ordinary care and prudence, have avoided the injury?" an affirmative answer to that inquiry did mean, as the Court instructed the jury, that an injury which could have been prevented by due diligence on the part of defendant company was due to its negligence. The Judge who tried the case below did not frame the issues and was not asked to remodel them. In instructing the jury upon them, in the shape in which counsel had left them, he told them properly that whether they passed upon the first or third issue the very same ultimate question was raised, whether the negligence of the defendant was the proximate cause supervening subsequent to the fault of the plaintiff. Some confusion has arisen out of the fact that, in some instances where the abstract principle that these issues might be framed has been stated, the same mistake has been made, as here, viz., by embodying the question of proximate cause, as well as of defendant's negligence, in terms in the first issue; but it will be remembered that in Deans' case it was immaterial to discuss the form of issues not submitted at all. The cases in which the suggestion that it might aid the jury in understanding questions of negligence in some instances to submit these issues or where that plan has been approved are *McAdoo* v. *Railroad, supra; Denmark* v. *Railroad, supra; Bean* v. *Railroad*, 107 N. C., 731; *Blackwell* v. *Railroad, supra.*

By reference to the case of *Bottoms* v. *Railroad*, 109 N. C., 73, will be found three issues that are framed substantially in accordance with the suggestion of this Court, and which the most illiberal critic would not venture to say led to confusion or to any illogical results. On the contrary, it can be seen at a glance that they were so framed as to aid the jury in understanding the several stages of the findings upon which the ultimate liability depended. It has been suggested heretofore that perhaps this system presented the questions involved so clearly as to afford opportunity to an unfair jury to give expression to their prejudices in the verdict, but never that it might, when properly understood, give rise to confusion. When verdicts are against the weight of evidence, or damages excessive, the corrective is in the power of the trial Judge to set aside verdicts—a power which Judges who are fair and just do not hesitate to exercise—and of the Legislature to provide as far as may be for the selection of intelligent and unbiased jurors.

I concur with the Court in the ruling that the doctrine laid down in McAdoo's case should be followed, but it is doubtful whether the language of the issues can be fairly construed so as to show that the charge of the Judge was in conflict with the principle there enunciated.

CLARK, J., dissenting: When a person is walking on the track the engineer is to presume that upon sounding the signal he will get off and is not called on to slacken speed or stop (*Meredith* v. *Railroad*, 108 N. C., 616) unless he recognizes him in time as an insane or deaf man, or unless it is a child without sufficient discretion. *Bottoms* v. *Railroad*, at this Term.

If a man, in a paroxysm or from drunkenness, or asleep, is lying on the track and the engineer sees him in time to avert the injury and does not do so, the company is liable. Why? Because the negligence of the man does not authorize the engineer to kill him or cripple him and if, after discovery of his helpless condition, when made in time to avoid injury, the man is killed or crippled, such killing or crippling is wanton or reckless and the company is liable, though of course the negligence of the party on the track continues up to the very moment of the impact.

Now, take this state of facts as found by the jury. The man is helpless, lying prone upon a railroad track and the engineer, by the exercise of ordinary care in keeping a proper lookout, could have discovered the helpless man in time to avoid killing or crippling him, but because he was not using ordinary care and was negligent in that duty the engineer does not in fact see the helpless man in time and runs over him: is not the company liable? But it is said that the company owes no duty to the man lying helpless on the track. This plea is the same as one made of old, "Am I my brother's keeper?" And we are told that that brother's blood "cried from the ground."

In *Clark* v. *Railroad*, 109 N. C., 430, it was held (it is true by a divided Court) that the railroad company was liable for killing a man on a short trestle, though the man was walking. The company was held responsible, though the engineer on a rapidly moving train could hardly have had time to calculate exactly where the trestle was and that at the respective rates the man and engine were moving the engine would overtake the man exactly at that spot where he could not easily have stepped off. That case is a precedent and entitled to due weight as such. If the company is held to liability for striking a walking man (who is expected to step off) because the engineer cannot calculate that he will overtake the man at a particular dangerous spot, for a stronger reason should the company be liable when the man is down on the track and the engineer can know that he is in a dangerous place with less trouble than making a calculation and by the exercise of no other faculty than the use of his eyes in keeping the ordinary lookout which his duty to the passengers and train in his charge requires him to keep any way.

Population is increasing and likewise the speed and rapidity of railroad trains. It will be more and more impossible to keep people off the track as the country settles up. Their being there is no license to kill or cripple them on sight. The railroad companies have the right of way over their own tracks, but they must use it with reason and with a regard to human life. "*Sic utere tuo, ut non alienum laedas.*" If the man is walking on the track he is reasonably to be expected to get off in time, especially if the whistle is sounded. If he does not, clearly the company is not liable. The man is negligent and the company shows neither wantonness nor recklessness. If the man is crossing the track, he must look and listen. If he does not and the engine strikes him, it is clearly his fault and there is no recklessness or wantonness on the part of the engineer, for as the man has only five feet to go clearly the engineer could not see him in time to avoid striking him. If the party struck is a mere child, or live stock, and the engineer could have seen them in time to avoid injury, and does not, the company is liable because of its own negligence in not keeping a proper lookout. Its failure to keep such lookout is such recklessness as makes it liable, for it "owes no duty" to the live stock or the child. If the man is down on the track he is as helpless and as little to be expected to get off as a little child or live stock. There is no more deadly a machine than a modern sixty or one hundred-ton engine driving across the country on its narrow ribbon of steel at sixty miles an hour. Whatever it strikes fairly is killed as surely as if struck by a cannon-ball. Commerce requires the free use of the track by these deadly machines. But the hand upon the throttle-valve must be steady and a lookout for danger well kept. This is common sense and justice. It can never be made a part of the law of the land that these Goliaths of mechanism can kill or crush whatever they shall find in their path. Live stock and children they must look out for. If by failure to do this they are injured the company is liable. The safety of a man lying on the track cannot be insured. He has no business to be there. But if the engineer on a passing train, by ordinary care in keeping the lookout which his duty to the safety of the train requires, could see the man (as the jury find) in time to avoid killing him and does not do so, this negligence in one vested with so important a trust is recklessness which renders the company liable notwithstanding the negligence of the party struck by the engine.

Respect for the doctrine of *stare decisis* forbids us to so soon overrule the decisions of this Court in the late cases of *Deans* v. *Railroad*, 107 N. C., 686; *Clark* v. *Railroad*, 109 N. C., 430, and others on that line.

The decision in *Deans* v. *Railroad*, *supra*, imposed no additional duty on railroad companies. The company was, and is, liable for a failure to keep a lookout if thereby injury is caused to its passengers, to live stock or to a little child. That decision merely held that the same failure to keep a proper lookout would make the company liable as to a man lying in a helpless condition on the track. This does not, as argued, abolish or affect the doctrine of contributory negligence. The failure of one in charge of so powerful, dangerous and rapid moving a machine to keep a proper lookout is recklessness which makes the company liable whenever the jury find that, by a proper lookout, the helpless man could have been discovered in time to avoid killing him. Human life is worth that much consideration if it is worth any thing.

STATE, on the relation of Blount, Solicitor, v. C. C. SPENCER.

Oyster Beds—Shell-fish Commissioners—Establishing Public Grounds—Grants by State—Vacation of Grant.

1. Where a grant has been issued in strict compliance with the law, rights of property have been acquired which cannot be taken away, even by the State, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain.
2. The decision of the Board of Shell-fish Commissioners fixing the location of the public grounds under the provisions of ch. 119, Acts of 1887, is final where there was no protest or appeal and in the absence of fraud or mistake; and an entry and grant of a natural oyster bed not included in the boundaries fixed by the Board cannot be vacated on the ground that such bed was not subject to entry.

ACTION, tried at Fall Term, 1893, of HYDE Superior Court, before *Graves, J.*, on complaint and demurrer, which were as follows:

"1. That on the 26th day of June, 1888, Christopher C. Spencer, the above-named defendant, made application to the entry-taker of Hyde county to enter, and did enter, and on the 16th day of May, 1889, in pursuance with said entry and after survey as required by law, obtained a grant from the State of North Carolina for a certain tract of land, or perpetual franchise to cultivate oysters on said land (a copy of said grant is hereto attached as a part hereof, marked "A," and is referred to for all proper purposes), said oyster ground being situated within and covered by the waters of Pamlico Sound, which is a public and navigable stream.

"2. That the aforesaid entry includes a reef or bottom where oysters are found growing naturally, not sparsely or at intervals, but in a mass or stratum in sufficient quantities to be valuable to the public.

"3. That the said entry is within the boundaries of the land and waters described in chapter 119 of the Public Laws of 1887, and within the boundaries of the land surveyed by the Shell-fish Commissioners under and by virtue of said act as being subject to entry, but was not any part of any of the natural oyster beds as marked out by the Shell-fish Commissioners under and by virtue of said act as not subject to entry. (The report of said Commissioners is hereto attached as Exhibit 'B')."

Wherefore plaintiff prays judgment:

"1. That said entry and grant be vacated and set aside.

"2. For cost, and such other relief, etc."

The defendant herein demurred to the complaint as filed by plaintiff and assigned the following grounds for demurrer, to-wit:

"1. That the complaint does not state facts sufficient to constitute a cause of action.

"2. For that it appears upon the face of the complaint that the lands described in section 1 of the complaint were entered under and by virtue of the Act of 1887, chapter 119, and were not any part of the lands exempt from entry under said act, but were a part of the lands expressly opened for entry and grant thereunder, and under the survey and action of the Shell-fish Commissioners therein appointed."

Wherefore defendant prays judgment:

"1. That the action be dismissed; that defendant go without day, and recover his costs, etc."

The demurrer was sustained, and plaintiff appealed.

The sections of chapter 119 of the Laws of 1887 bearing upon the subject discussed in the opinion are as follows:

"4. The Board of Shell-fish Commissioners shall cause to be made a survey and map of the area hereinbefore described, whereon shall be shown the location and area of all the natural beds and of all the grounds which may have been occupied under authority of previous acts for the growing, planting or cultivation of shell-fish, and upon the completion of the said surveys in and maps of each or any county the Board of Commissioners of Shell-fisheries shall determine the location, area, limits and designation of each and every public ground in the county, and such public grounds are to include the natural beds, together with such additional areas adjacent thereto as may be deemed by the Board of Commissioners as necessary to provide for the natural expansion of the said natural beds; and having decided upon the location, area, limits and designation of the said public grounds, the Board of Commissioners of Shell-fisheries shall publish the same for the period of thirty days at the court-house door and in four other public places in the county wherein the said public grounds are located; and any person or persons objecting to the decision of the Board as published may file a written protest stating the grounds for his or their objections within the said thirty days with the Clerk of the Superior Court of the county wherein the said publication is made, upon payment to the Clerk of the sum of twenty-five cents, and at the expiration of said thirty days the said Clerk shall forward all such written protests to said Board, and in case such protests are so filed and forwarded the said Commissioners, or a majority of them, shall, upon fifteen days' notice in writing, mailed or personally delivered to all parties in interest, hear and pass upon such protests or objections in the county in which said public grounds are located; and said Board, having fully informed themselves of the facts in the case, shall make, within twenty days from the conclusion of the hearing, a decision which shall be final, and shall be so considered until reversed on appeal to the Superior Court. And at all hearings authorized by this act the said Commissioners may by themselves or their clerk subpœna witnesses and administer oaths as in courts of law."

"Section 5. The Board of Commissioners of Shell-fisheries shall, upon making the said final decision as to the location, limits, area and designation of the several public grounds in the county, publish the same in the county in which said public grounds are located and in two newspapers having a general circulation in the State, and shall announce in the said publication that at the expiration of twenty days from the first day of publication the territory within said county and embraced within the provisions of this act shall be open for entry in manner and form as hereinafter provided; and any person or persons desiring to raise, plant or cultivate shell-fish upon any ground in the county which has not been designated as public ground by said Board may at the expiration of the said period of thirty days make an application in writing, in which shall be stated as nearly as may be the area, limits and location of the ground desired, to the entry-taker of the county in which the said area for which application is made is situated, for a franchise for the purpose of raising or cultivating shell-fish in said grounds, and said entry-taker having received said application shall proceed as with all other entries as provided in section 2765 of *The Code* as amended, except that the warrant to survey and locate the grounds shall be delivered to the engineer appointed by said Board and not to the County Surveyor; and said engineer shall make such surveys in accordance with the provisions of section 2769 of *The Code*, except that it shall not be necessary to employ chain-bearers nor to administer oaths to assistants nor to make surveys, according to the priority of the application or warrant."

"6. The Secretary of State on receipt of the Auditor's certificate as provided in section 2778 of *The Code* shall grant to the applicant a written instrument conveying a perpetual franchise for the purpose of raising and cultivating shell-fish in and to the grounds for which application is made; and said written instrument of conveyence shall be authenticated by the Governor, countersigned by the Secretary of State and recorded in his office. The date of the application for the franchise and a description of the grounds for which such franchise was granted shall be inserted in each instrument, and no grant shall issue except in accordance with a certificate from the engineer of said Commissioners as to the area, limits and location of the grounds in which said franchise is to be granted, and every person obtaining such grant or franchise shall within three months from the receipt of the same record said written instrument in the office of the Register of Deeds for the county wherein said grounds may lie, and shall define the boundaries of said grounds by suitable stakes) buoys, ranges or monuments; but no franchise shall be given in or to any of the public grounds as determined by said Commissioners, and all franchises granted under this or previous acts shall be and remain in the grantee, his heirs and legal representatives; provided, that the holder or holders shall make in good faith within five years from the day of obtaining said franchise an actual effort to raise and cultivate shell-fish on said ground; and provided further, that the area hereinbefore described lying within two statute miles of the main-land or any island shall be entered or held only by residents of the State of North Carolina, and no grant shall be made to any one person of more than ten acres of said territory, and no person shall hold more than ten acres in any creek unless the same shall be acquired through devise, inheritance, or marriage. And all that territory within the provisions of this act and lying more than two miles from the main-land or any island shall be subject to entry by any person; but no person shall be permitted to enter in any one period of five years more than six hundred and forty acres."

The Attorney General, for the plaintiff (appellant).
Messrs. W. B. Rodman and *J. H. Small*, for defendant.

MACRAE, J. (after stating the facts): The entry made by the defendant covered a natural oyster bed, according to the definition given by this Court in *State* v. *Willis*, 104 N. C., 764, and subsequently adopted by statute—section 1, ch. 287, Acts 1893.

Only one question is presented by this appeal: Whether the action of the Board of Commissioners of Shell-fisheries, under ch. 119, Laws 1887, in laying off and establishing the locations of the public grounds of Hyde county, when there was no protest and appeal from their action in the premises, was a final decision, binding both the State and the party making an entry and receiving a grant under its provisions; or, may the entry and grant of a natural oyster bed not included in the boundaries fixed by said Board be now vacated and set aside upon the ground that the same is not subject to entry under the laws of North Carolina?

It seems to have been the policy of the Legislature for many years to encourage the cultivation of oysters and other shell-fish by private parties, and at the same time to preserve for the public use those natural beds where oysters were found in sufficient quantities to be of value to the public. A reference to some of the statutes upon the subject may be found in the opinion in the case above cited. At each session of the General Assembly since that of 1887 material changes have been made in the law upon this subject, but it will only be necessary to refer to one of these subsequent statutes, because, whatever rights the defendant may have in the franchise conveyed to him by the grant in question vest in him by virtue of said Act of 1887, and cannot be divested by subsequent legislation; therefore, the fact that this action is instituted under the provisions of the Act of 1893, ch. 287, section 4, gives it no additional strength.

It will be seen by reference to ch. 119, Laws 1887 (the 4th, 5th and 6th sections above set out in the statement of the case) that by said act an elaborate system was adopted for the furtherance of the objects in view, the encouragement of the culture of oysters, and also the preservation of the rights of the public in the use of the natural beds. A Board of Commissioners was appointed with clearly defined duties to have surveyed and mapped a certain area in which was included that part of Pamlico Sound which was within the jurisdiction of the county of Hyde, "whereon shall be shown the location and area of all the natural oyster beds, and of all the grounds which may have been occupied under the authority of previous acts for the growing, etc., of shell-fish; and upon the completion of said surveys in and maps of each or any county the Board of Commissioners of Shell-fishery shall *determine* the location, area, limits and designation of each and every public ground in the county, and such public grounds are to include the natural beds," etc.

It was further provided that persons dissatisfied with the action of the Board might file a protest with the Board, have a hearing after notice to all parties in interest, and that after such hearing the decision of the Board should be final until reversed on appeal to the Superior Court.

The final decision of the Board was to be published, and entries might be made of any ground which had not been designated as public ground, and after payment therefor grants were to issue, to the enterer, of a perpetual franchise to cultivate oysters within a certain limit and upon a certain condition. We are given to understand in the case before us that all the provisions of the law have been complied with, unless it be that the Board of Commissioners has failed to have all the natural beds included within the boundaries determined by said Board to be the public grounds of said county.

There is no question but that the locality of the grant was upon the land covered by the waters of Pamlico Sound, which is navigable water, and that the same was not subject to grant under the general laws regarding entries and grants, and became so subject in a qualified sense by virtue of the Act of 1887.

It will be conceded, also, that there was no stretching of the power of the Legislature in delegating to a Board of Commissioners the authority to designate what portions of the public domain not free to entry already should be opened to entry for the special purposes designated.

Acts of this kind are not infrequent, and the authority of such boards has not been seriously questioned, as far as we have been informed. Instances may be found of precedents in the appointment of commissioners from time to time to have surveyed and opened to sale and grant the lands in Western North Carolina acquired by treaty from the Cherokee Indians, which acts are set out in the Revised Statutes of 1836; or the appointment of commissioners under Act of Congress of March 3, 1877, in regard to the Hot Springs reservation in Arkansas, whose duties were to designate a portion of said tract to be still reserved, and to have the remaining portion surveyed off into lots, and to finally determine the rights of claimants and occupants to purchase the same. In the case of *Rector* v. *Gibbon*, 111 U. S., 276, it was held, there being no provision for an appeal from the decision of the commissioners, that their action was subject to review in the Courts. In our case, however, full provision was made for the review of the action of the Board of Commissioners, and, in case of no such review being sought and had, its decision was declared final.

A grant or patent may be vacated at the instance of a private person under section 2786 of *The Code*, and in an action brought by the Attorney General to vacate the same under section 2788. But these actions must be founded upon a charge of fraud or mistake.

The present action is brought under the provisions of the Act of 1893, ch. 287, sec. 4, which is as follows:

"4. That it shall be the duty of the Solicitor of the judicial district in which any county is situated, wherein there is any license, entry or grant or any oyster or clam bed, upon an affidavit being filed with him, sworn to and subscribed by five inhabitants of such county, stating that such license, entry or grant includes a natural oyster or clam bed, forthwith to institute an action in the Superior

Court of such county in the name of the State of North Carolina upon the relation of such Solicitor to vacate and amend such license, entry or grant, and to prosecute the same to judgment."

It appears, then, that a tribunal was established for the purpose of designating such portion of the lands, not theretofore subject to entry, and covered by the waters of Pamlico Sound and other waters, as were natural oyster beds, and to declare them public grounds, and that such other portions of said territory in the county of Hyde and certain other counties as was not included in said public grounds shall be open to entry for certain purposes and under certain restrictions, that a mode of review upon appeal from the final decision of said Board was provided in the act, and their decision in the absence of any reversal by the Courts declared final after a certain time; that the Legislature had power to make such provision, and that in the absence of fraud or mistake in the procurement or issue of the grant it must be binding upon the parties thereto. "If the terms of the grant are doubtful that construction will be adopted which least restricts the rights of the State and of the public, inasmuch as public grants, whether made by the Crown or by Congress or by a State, are construed strictly and pass only what appears by express words or necessary implication." Gould on Waters, p. 88.

But fraud is never presumed; when the State comes into its Courts seeking their aid in annulling a contract it is governed in general by the same rules as the citizen. It has provided its own tribunal with full powers and a system by which its decisions may be reviewed. These laws are binding upon us. Aware, as we are, of the importance of preserving these public grounds for the common benefit, we are not permitted to provide another way when the Legislature has marked out the course to be pursued by those who have been injured by the action of commissioners.

In the absence of any allegation of fraud or mistake in the complaint there was no cause of action stated. If grants have been issued under the provisions of and in strict accord with the law rights of property have been acquired which the State itself cannot take away except after compensation and under the principle of eminent domain.

His Honor could not have done otherwise than to sustain the demurrer. Affirmed.

STATE v. JOHN HILL.

Larceny—Felonious Intent—Secrecy—Remarks of Counsel.

1. While secrecy is usually a part of the evidence of felonious intent it is not such an essential accompaniment of larceny as to require the State, in every instance, to prove an attempt to conceal the taking.
2. Where, in the trial of an indictment for larceny, there was conflicting evidence as to the manner in which the defendant took and carried from a store a piece of meat, it was proper in the Court to leave the question of felonious intent to the jury.
3. Where the Solicitor, in reply to a remark by the defendant's counsel that the defendant was a respectable white man, said to the jury that he himself was a colored man, and that if defendant was a colored man the jury would convict him in five minutes on the evidence, the error (if any) in permitting such remark to the jury was cured by a caution by the Court, in its charge to the jury, not to be influenced by the remarks complained of.

INDICTMENT for larceny, tried at Fall Term, 1893, of BERTIE Superior Court, before *Bynum, J.*, and a jury.

It appeared on the trial that the defendant took some meat from a store to a cart belonging to Godwin, but to which his own oxen were hitched. He claimed that Charles Godwin asked him to carry out the meat, which Godwin said was his. The meat was discovered under the shucks in the cart. There was conflicting testimony as to the manner in which defendant carried the meat from the store, one witness saying he put it under his overcoat, and another that he held it in front of his body as he walked out.

Upon the conclusion of the evidence defendant's counsel asked in writing for the following instructions:

"If defendant openly carried the meat through the store, a crowd of people being in the store at the time, then there was no evidence of a felonious intent or felonious taking."

In addressing the jury one of the counsel for the defendant alluded to his client, the defendant, as a respectable white man, genteel-looking, who had succeeded in supporting himself well, and being nicely dressed and making a good appearance, and it was unreasonable to suppose a man of such appearance would steal the meat.

When the Solicitor for the State came to reply he said: "Now, gentlemen of the jury, I am a colored man; you are white men. If the defendant was a colored man you would convict him in five minutes on this evidence."

At this point counsel for defendant objected to this argument. The Court held it was a legitimate argument in reply to what had been said for the defendant, and the defendant excepted.

The Court declined to give the instructions asked by defendant, but instructed the jury as follows:

"The defendant admits that he took the meat from the box in the store and put it in the cart. This is a sufficient asportation, and if he took it from the box and put it in the cart with the intent to steal and carry it away, he would be guilty, although Holloman got the meat back before the defendant had gone off with it any further than to put it in the cart. But the defendant says he did not take it with intent to steal it; that Charles Godwin told him to take it, and he did so for that reason, supposing the meat to be his. If the State has satisfied you beyond a reasonable doubt that the defendant took the meat of his own will, with the intent to steal it, it will be your duty to return a verdict of guilty. If he took the meat at the request of Charles Godwin in the honest belief that it was Godwin's meat, he would not be guilty, and it would be your duty to acquit him.

"The question for you is not whether the defendant is a white man or a colored man; not whether the evidence is sufficient for you to convict a colored man on or a white man, but it is for you to consider whether the evidence is sufficient, and does satisfy you beyond a reasonable doubt that this defendant, just as he appears before you, is guilty."

The Court then stated a summary of the circumstances relied on for the State and for the defendant.

There was no exception to the charge as given, except the failure to give the instruction prayed for.

There was a verdict of guilty, and defendant appealed from the judgment thereon.

The Attorney General, for the State.
Mr. F. D. Winston, for defendant (appellant).

AVERY, J.: Secrecy is usually a part of the evidence of a felonious intent, but it is not an essential accompaniment so as to make it incumbent on the State to show an attempt to conceal the taking in every instance. *State* v. *Powell*, 103 N. C., 424; *State* v. *Fisher*, 70 N. C., 78. In the most favorable aspect of the testimony as to the manner of taking and carrying the meat out of the store, the question of the intent of the defendant was one for the jury, and whether he went out of the store carrying it in front of him or under his overcoat, it was proper for the Court below to leave the jury to determine whether it was taken to the wagon at the request of Charles Godwin, and under the belief that Godwin had bought it, or whether it was the purpose of the defendant to deprive the true owner of it and convert it to his own use.

If the Solicitor abused his privilege, as counsel for the State, in his comments in reference to the color of the defendant, it was not such an extreme case as to take it out of the general and well-established rule that the Court may either stop counsel at the time or caution the jury in its charge not to be influenced by the remarks complained of. *Greenlee* v. *Greenlee*, 93 N. C., 278; *State* v. *Bryan*, 89 N. C., 531; *Kerchner* v. *McRae*, 80 N. C., 219; *State* v. *Weddington*, 103 N. C., 364; *Hudson* v. *Jordan*, 108 N. C., 10. We must not be understood as holding that as a reply to what had been said by the defendant's counsel the remarks of the Solicitor upon this subject were not within the line of fair and legitimate debate. There was No Error.

STATE v. J. T. WALTON.

Indictment for False Pretense—Evidence—Intent—Testimony as to Other Offences, when admissible.

1. In the trial of an indictment for obtaining money under false pretenses it is competent, in order to show the *scienter* and intent, to prove other similar transactions by the defendant.
2. In the trial of an indictment for obtaining money under false pretenses by inducing the County Treasurer to cash an order represented by the defendant as being genuine, evidence offered by defendant as to the stub-book kept by him in the Register of Deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true.

INDICTMENT, tried at Fall Term, 1893, of GATES Superior Court, before *Graves, J.*

The defendant was charged with intending to cheat and defraud J. F. Bond, as Treasurer of the county, out of the money, goods and chattels in the custody of said Bond, and that he unlawfully, feloniously and designedly did falsely pretend to the said Bond, as said Treasurer, that a certain paper-writing in words and figures, etc., was a true and genuine order for the payment of money, etc., and that he owned the same and had the right to transfer it to the said Bond, as Treasurer, and receive the money therefor to the amount mentioned in said paper-writing, being $41.32, whereas in truth and in fact, etc.

Upon the trial the jury found the defendant guilty, and he appealed from the judgment pronounced thereon.

The Attorney General, for the State.
No counsel *contra.*

MACRAE, J. (after stating the facts): The first exception cannot be sustained. In order to show the *scienter* and the intent, and for that purpose only, the State offered evidence of similar transactions on the part of the defendant. The question of the admissibility of evidence of this character has been so clearly stated by *Ashe, J.*, in the case of *State* v. *Murphy*, 84 N. C., 742, that we have only to reproduce a part of the opinion in that case. "It is a fundamental principle of law that evidence of one offence cannot be given against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well-established rule, except in those cases where evidence of independent offences has been admitted to explain or illustrate the facts upon which certain indictments are founded, as where, in the investigation of an offence, it becomes necessary to prove the *quo animo*, the intent, design or guilty knowledge. In such cases it has been held admissible to prove other offences of like character, as, for instance, in indictments for passing counterfeit money, the fact that the defendant about the same time had passed other counterfeit money of like kind has been uniformly held to be admissible to show the *scienter* or guilty knowledge. So on a charge for sending a threatening letter, prior and subsequent letters from the defendant to the person threatened have been received in evidence explanatory of the meaning and *intent* of the particular letter upon which the indictment is found." Many authorities are there cited and illustrations offered. The charge in the present case was that the defendant did falsely, etc., pretend to the County Treasurer that a certain paper-writing was a true and genuine order for the payment of money as it purported to be, and that by means of said false pretense the defendant obtained the money from said Treasurer. The defence was the absence of any intent to defraud. There could not be more direct evidence of such intent than the facts that the defendant had presented other false papers to the Treasurer and obtained money upon the same, and upon the discovery thereof had refunded the money.

In *State* v. *Wilkinson*, 98 N. C., 696, where the defendant was indicted for falsely obtaining from the County Commissioners an order for the payment of money, evidence was admitted of continuous transactions of the same character, and the State proposed to prove the obtaining of other orders of the same kind, without producing the orders, and testimony having been admitted, the Court said, "the extent of the general rule which requires the production of a written instrument to prove its contents, and admits of secondary evidence when it is lost or destroyed, is often misconceived. The rule does not apply to cases where the orders come up on a *collateral* inquiry, and a party is not expected to be prepared to produce them." In that case no point was made upon the admissibility of the evidence except as above stated. The decision in the case of *State* v. *Ballard*, 100 N. C., 486, where evidence was offered as to reports that defendant had been guilty of similar offences, is not in conflict with that which is cited above. The witness had testified to the good character of defendant, and the State proposed to ask the witness if he did not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of A B. This was admitted after objection by defendant, and the defendant excepted to the answer. The Court said, "the inquiry allowed in this case was of a specific act of deceit and fraud, and this resting on *rumor* only," etc.

The second exception, to the refusal of his Honor to admit evidence as to the stub-book kept by the defendant in the office of the Register of Deeds and the stub therein which would show the order was issued for a bill of stationery, etc., is also untenable, because the evidence offered was irrelevant; it was not corroborative of the evidence of defendant as to intent, or competent for any other purpose. It did not in any manner tend to show that the representation of defendant to the County Treasurer, that the order presented was a genuine one, was true. Admitting this evidence, still the question was, Did the defendant obtain the money by means of the false representation charged? If said representation was false, the reiteration of it would not tell in favor of defendant.

It is said for the defence that a man might collect an honest debt by means of false pretenses, and there would be no intent to defraud, and several authorities are cited which it will be unnecessary to consider, for, according to the testimony in this case, even if there had been such an indebtedness as claimed, the County Commissioners had never ordered its payment. The County Treasurer had no authority to pay the same except upon such order. The fraud was practiced upon him, and the money was obtained upon the false representation that it was a genuine order.

The intent to deceive was established to the satisfaction of the jury by the proof of the false representation that the paper presented was a genuine order, when, whatever may have been the motive of the defendant, this representation was to his own knowledge false, the Commissioners never having made such order. It was calculated to deceive, because it was apparently genuine and attested by the proper officer. It did deceive, because by means of it the defendant obtained the money. *State* v. *Phifer*, 65 N. C. 321. We see No Error.

STATE v. CHARLES EASON.

Indictment for Violation of Town Ordinance—Boundaries of Municipality—Navigable Stream—Low Water Mark—Thread of Stream.

1. In North Carolina the test of navigability of a stream is whether it is navigable for sea-going vessels, and not whether it is subject to the ebb and flow of the tides.
2. A grant to a riparian owner, running with a navigable stream, extends only to the low water mark and not to the thread of the stream, and in defining the limits of an incorporated town bordering on such a stream the same rule of construction applies; therefore,
3. Where the State confers municipal powers upon a corporation and describes the boundary as running with a navigable river, the jurisdiction of such municipality does not extend beyond the low water mark in the absence of some provision in its charter expressly or by fair implication extending the limit of its jurisdiction.

Quære: Whether a warrant charging generally the violation of an ordinance, which denounces eight prohibited offences, can be amended after verdict by inserting the specific charge of the commission of one of the prohibited acts.

This was a CRIMINAL ACTION, instituted before the Mayor of the town of Washington and tried on appeal in the Superior Court of BEAUFORT County, before *Graves, J.* The original affidavit and warrant were as follows:

"On the 21st of September, 1893, before me, E. M. Short, Mayor of Washington, N. C., personally appeared J. R. Grist, who, being duly sworn, complains on oath and says that Charles Eason did on the 20th of September, 1893, in violation of the town ordinance No. 11, in force in said town, contrary to the statute in such case made and provided and against the peace and dignity of the State."

The Warrant.—"You are hereby commanded forthwith to arrest Charles Eason and him safely keep so you have him before me, at my office in Washington, immediately to answer the above complaint and be dealt with as the law directs."

The amendment allowed after judgment and verdict was as follows: "Did unlawfully and willfully throw dead fish in the Pamlico river in said town, in violation of the town ordinance No. 11 of the town of Washington."

The amendment was inserted, as set forth in the statement of the Judge, and the material portions of the statement are as follows:

"*Ordinance No. 11.*—No sheep, goat or cattle shall be slaughtered for market within the corporate limits of the town; nor shall any fish be cleaned on the wharves, streets or lots of the town, except for the use of families in said town, and no dead fish or offal thrown into the river."

Penalty for the violation of this ordinance was five dollars.

The jury rendered a special verdict that the town of

Washington is bounded on the south by Pamlico river, which is a navigable stream, and the boundaries of the said town are set forth in chapter 110 of Private Laws of 1891, and the cedar post referred to is on the bank of the said river. That the fish-house hereinafter described is situated as follows: The northern sill of the said house rests upon the wharf-log, which said wharf-log is beyond the natural low water mark, being the end of the made-land which was made prior to 1891. That the wharf at the said point extends further out in the river than the wharves immediately to the east and west of the said wharf, and the said wharves mark the present shore line of said river and the present low water mark; that the water at the end of all of the said wharves is of sufficient depth to be navigated; that from said wharf said house is built on piles driven in the bed of the river and extending about thirty feet out from said wharf over the water; that the water of the river flowing under said house is of sufficient depth to be navigated if it were not for said piles; that the southern end of said house borders on the channel of the river; that Wynne and Gaskill have boats to land at said fish-house, from which boats they receive fish; that the river is about four hundred yards wide at this point; that ordinance 11 of the town forbids the throwing of dead fish into said river, and the penalty is five dollars; that on the 20th day of September, 1893, the defendant threw dead fish into said river from said fish-house; that the said fish-house was built over the said water by one J. R. Wynne under a license regularly issued by the Commissioners of Navigation for the port of Washington, granted on March 31, 1892; that if upon these facts the defendant is guilty in law the jury say for their verdict that the defendant is guilty, and if upon these facts in law he is not guilty the jury say for their verdict 'Not guilty.'"

Upon these facts the Court, being of opinion that the defendant was not within the corporate limits of the town, directed the jury to render a verdict of not guilty, and thereupon the jury, under the instruction of the Court, rendered a verdict of not guilty.

The Solicitor for the State, after verdict, moved to amend the warrant by inserting therein after the figures 1893 the following words, "Did unlawfully and willfully throw dead fish into the Pamlico river in said town, in violation of the town ordinance No. 11, of the town of Washington, N. C."

The Court allowed this amendment, and the defendant excepted.

The Attorney General and *Mr. Charles F. Warren*, for the State.

Mr. W. B. Rodman, for defendant.

AVERY, J.: Our numerous long streams and large inland sounds come so clearly within the reason of the rule adopted on account of the different conditions in England, exclusively to waters subject to the ebb and flow of the tides, that it became necessary to establish here a new test of navigability in determining what submerged land should be reserved as the property of the State and what should be liable to appropriation by private persons by specific entry and grant or should pass as incident to patents issued to riparian proprietors. The criterion in North Carolina is whether the stream, bay or sound is navigable for sea-going vessels. *Broadnax* v. *Baker*, 94 N. C., 681; *Hodges* v. *Williams*, 95 N. C., 331; Angell on Water-courses, sec. 549, and note; *Collins* v. *Benbury*, 3 Ired., 277; *Fagan* v. *Armistead*, 11 Ired., 433. While the bed of a stream navigable or declared by the Legislature to be navigable for "sea vessels" is not subject to entry, the beds of streams that are large enough to subserve the purpose of highways for smaller boats, floats, rafts and logs but insufficient for sea-going vessels may be granted specifically or pass by deeds of riparian proprietors on both sides, running with rivers and extending by construction *ad filum aquae*, but subject to the easement of the public to use the channel as a highway. *Bond* v. *Wool*, 107 N. C., 149; *State* v. *Glenn*, 7 Jones, 325; *Williams* v. *Buchanan*, 1 Ired., 535; *McNamee* v. *Alexander*, 109 N. C., 244. The legislation in North Carolina has been generally in affirmance of the new rule so much better adapted to the nature of this country. Our statutes, with the exception of a short interval, have never permitted the issuing of grants to private individuals for the beds of streams navigable for sea vessels, even though not affected by the tides, beyond the deep water line at most. *Bond* v. *Wool, supra;* 1 Potter's Rev., 278; Rev. Stat., ch. 42, sec. 1; Acts of 1777, ch. 114; *Hotsfield* v. *Grimstead*, 7 Ired., 139; *The Code*, §2751; Laws 1889, ch. 555; Laws 1893, ch. 17.

It follows, therefore, that a grant to a riparian proprietor, running with a navigable stream, such as the Pamlico river at Washington, from one designated point on its banks to another above or below on the same bank, must be so located as to extend, not *ad filum aquae*, but only to the low water mark along the margin of the stream. This Court having uniformly interpreted such calls in grants to individuals as designating the low water line, we know of no recognized rule of construction that would sustain us in giving a widely different meaning to the same language when used by the Legislature to define the limits of a town. Gould (in his work on Waters, section 202) says, in ascertaining the boundaries of towns: "The same rules of construction apply as in the case of a grant from one individual to another." A municipal corporation can exercise only such powers as are expressly granted by its charter or are necessarily implied in or incident to the powers expressly granted. 1 Dillon on Corp., sec. 89; *Thompson* v. *Lee Co.*, 3 Wall., 320; *Thomas* v. *Richmond*, 12 Wall., 349. "Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public." *Minturn* v. *Larue*, 23 Howard, 436. A municipality being thus restricted to the exercise of powers clearly intended to be delegated, it would seem that, if the same rigid rule of construction does not obtain in determining the territorial limits to which its authority extends, the location of the geographical limit of its territorial jurisdiction should at all events be determined just as similar calls of grants to individuals are located. "Because the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the incorporation, it is necessary" (says Dillon) "that these limits be definitely fixed." 1 Dillon, section 182 (124). But the Legislature unquestionably had the power to extend the jurisdiction of the town for police purposes to the middle of the river or to the opposite bank, and had the line been described as crossing the other side when it reached the river, and running thence along that shore to a point opposite the beginning, thence to the beginning, the effect would have been to extend the boundary for the exercise of the power to prohibit nuisance delegated to the town across the adjacent bed of the river, while the territorial limit of its authority for all purposes other than the exercise of police powers would have been the low water mark on the north bank. *Barber* v. *Connolly*, 113 U. S., 27; *Mugler* v. *Kansas*, 123 U. S., 123; *Palmer* v. *Hicks*, 6 Johns., N. Y., 133; *Ogdensburg* v. *Lyon*, 7 Lowring (N. Y.), 215. We are aware that the authorities in this country are conflicting as to the location of boundaries along inland navigable streams, whether the controversy grows out of fixing the limits of a town or locating the lines of grant.

We find that as a rule, however, the Courts in ascertaining the limits of towns have followed their own rulings as to riparian grants. The common law doctrine was recognized and applied at an early day by the Courts of Massachusetts, New Hampshire, Connecticut, Maryland and Virginia, and later by Ohio, Illinois, Indiana, and some other States. Angell on Water-courses, section 547. On the contrary, the common law rule was repudiated by Pennsylvania, North Carolina, South Carolina, Tennessee, Alabama, Michigan, and other States, and a doctrine somewhat similar to the rule of the civil law was substituted for that adopted in England. Angell, *supra*, sections 548 to 552; 2 Am. and Eng. Enc., 505; 16 Am. and Eng. Enc., 236, *et seq; Ibid.*, 249 *et seq.*

In the comparatively recent case of Gilchrist's appeal, 109 Pa. St., 600, the Supreme Court of that State held that the limit of a municipality bounded by a navigable river is the low water mark of that river, unless express language to the contrary is used in the act of incorporation. The question involved was whether the city of Wilkesbarre had the power to levy and collect a tax upon the coal beds under the bed of the river opposite to that city. The right of the city was denied by the Court, and the decision rested upon the ground that a grant to an individual was construed to run with the low water mark of a navigable stream, and the same rule should be appplied in locating the boundaries of towns.

The Supreme Court of Michigan, in the *City of Coldwater* v. *Tucker*, 24 Am. Rep., 601, 36 Mich., 474, said: "The general doctrine is clear that a municipal corporation cannot usually exercise its powers beyond its own limits. If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the Legislature to grant such power." See also, *People* v. *Bouchard,* 82 Mich., 158; Gould on Waters, sec. 36. In *Palmer* v. *Hicks,* 6 Johns., 132, and *Styker* v. *The Mayor, etc., of N. Y.*, 19 Johns., cited for the plaintiff, it appeared that the Legislature in both instances had extended the line of a city or town across the bed of a navigable stream to the opposite bank, and the Court decided that the statutes extended the jurisdiction of the city for police purposes with the extended line. Any remark from which an inference may be drawn as to the location of a town limit, where the stream is called for, was therefore *obiter*, if indeed such inference is deducible from the language used by the Court. The bed of a navigable stream, said the Supreme Court of New York in *Ogdensburg* v. *Lyon,* 7 Low., 215, "is still State, not United States, territory, and the State or its municipalities under its authority may pass laws or ordinances" not in conflict with the Constitution of the United States or the laws of Congress enacted within its constitutional powers. In the case last cited the question was whether the State could empower a city council to pass ordinances to prevent the casting into the adjacent harbor of matter calculated to obstruct it, where the authority had been delegated to the town by virtue of an express statute conferring it, not as an incident to the usual municipal powers, in the absence of a direct grant, expressly or by fair implication, of that particular power. In the section of Horr & Bemis (Mun., Vol. I, 142) cited for the prosecution it seems that the author, after embodying a sentence from *Coldwater* v. *Tucker, supra,* in which the Supreme Court of Michigan declared that a municipality could extend its police jurisdiction beyond its territorial limits only by virtue of a statute conferring such authority expressly or by necessary implication, proceeds in the same section to state as an inference drawn from the two cases already cited from Johnston's reports the proposition that, where two towns are situated on opposite banks of the same river, and the boundaries of both run with the river, though it is navigable, the dividing line will be the thread of the stream. No such conclusion was fairly deducible from those decisions, because in both instances, as already stated, the whole bed of the stream had been expressly placed by statute under the police jurisdiction of one of the two riparian municipalities. Indeed, after a patient investigation of the whole subject, we have found but a single authority for the position that a grant calling for a navigable stream should be confined to the low water mark, while a similar line in the boundaries of a municipality should run with the thread of the stream, and the opinion in that case was evidently not well considered, as the point was decided without any discussion whatever.

We think the rule laid down by the Court of Pennsylvania and approved by Gould is the correct one—that the same construction which is given to the description of the *locus* conveyed in deeds and grants to individuals must be placed upon similar language when used to define the boundaries of a municipality. We conclude, therefore, that where the State confers municipal powers upon a corporation, and describes its boundary as running with a navigable river, the jurisdiction of the municipality does not extend beyond the low water mark in the absence of some other language in the charter extending the limit of its jurisdiction expressly or by fair implication. We can readily conceive how the decayed fish and offal thrown into a river like the Pamlico in front of Washington, where the influence of the tides is felt, may become an almost unendurable nuisance. But further annoyance might have been prevented by a proper amendment of the charter of the town, and may still be obviated by legislation in the future. Meantime, unless the powers of the Commissioners of Navigation, under section 3537, can be invoked to protect those who suffer from the stench by this offensive matter floating upon the river or lodging on the banks, we deem it more important that the Court should be reasonable and consistent in its rulings, so as to inspire confidence in their justice and stability, than that some of its citizens should be relieved without delay of even so sore a grievance.

We think, therefore, that there was no error in the ruling of the Court below that even upon a warrant sufficient in form the defendant could not be convicted for a violation of the ordinance prohibiting the throwing of fish or offal into the river beyond the limit of its jurisdiction, the low water line, and the judgment must be affirmed. In view of the peculiar hardship to the people interested of enduring this annoyance we suggest also an investigation of the question whether the facts as to the conduct of this particular defendant or the facts in any other case of creating a stench in the river, which is a public highway, by casting fish or offal into it, would sustain an indictment for nuisance at common law. *Commissioners* v. *Sweeney*, 131 Mass., 579; *State* v. *Wolf*, 112 N. C., 889.

Counsel on both sides discussed the question whether the Court had the power after verdict to amend the warrant, which before charged that the defendant "did on the 20th day of September, 1893, in violation of ordinance 11, section --, of the ordinances in force of the said town of Washington, contrary to the statute in such case made and provided and against the peace and dignity of the State," by inserting specific charge of throwing dead fish into Pamlico river. As the ordinance embraced eight distinct charges that might have been made, seven others besides that set forth in the amendment, we deem it a matter of such importance as to make it proper to say that the question is still an open one, which we refrain from discussing, because it is not essential to the final disposition of this particular case to do so. Affirmed.

STATE v. RAPHAEL BEHRMAN.

Indictment for Fornication and Adultery—Marriage Evidence—Proof of Foreign Laws—Certificate of Foreign Marriage—Res Gestæ.

1. Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under section 1338 of *The Code*, testify to and explain them before Courts and juries (SHEPHERD, C. J., dissenting).
2. A paper-writing purporting to be a contract of marriage, and to be signed by the contracting parties at the time of the alleged marriage, is admissible, in the trial of an indictment for fornication and adultery, not only in corroboration of a witness who testified to the facts, but also as substantive evidence to prove the marriage.
3. Where, in the trial of an indictment for fornication and adultery, a photograph of defendant was introduced, on the back of which, signed with his name, were words purporting to be a marriage to his wife and indicating that the one to whom the message was addressed was married, and the alleged wife (prosecuting witness) testified that the writing was the defendant's and that the photograph had been sent to her: *Held*, that such writing was admissible as an acknowledgment of marriage.
4. Where, in the trial of an indictment for fornication and adultery, the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and seal of the official minister of such foreign country, although inadmissible as a record or an independent declaration of the rabbi, it was competent as a part of the *res gestæ* to support the testimony of the prosecuting witness as to the fact of the marriage.

INDICTMENT for fornication and adultery, tried before *Bynum, J.*, and a jury, at Fall Term, 1893, of EDGECOMBE Superior Court.

Sarah Behrman, a witness for the State, testified: "I came from Riga, Russia; know the defendant, Raphael Behrman; was married to him, in Riga, on the 25th of December, 1884, by a rabbi." The witness produced the following paper (translation of marriage certificate):

"The rabbi of the city of Riga herewith attests to the marriage of Raphael Behrman, from Oknian, with Sarah Dinah, daughter of Noah Strauch, from Tuckkum, on December 25, 1884, held in the city of Riga. This is certified by the signature and seal of the official minister.

"(Signed) M. SHAPIRA, [L. S.]"

And she testified it was given her by the Court, and was signed by the rabbi who married her to the defendant, and that he put his stamp upon it, and she carried it back to the Court and it was stamped by the Court. The following paper was also produced (translation of the marriage contract):

"On the third day of the tenth month, according to the Hebrew calendar, in the year 5640, at that time the son, Raphael, of the father by the name of Aaron, Raphael, son of Aaron, said to Sarah Dinah, the daughter from Noah, that she will be his wife according to the laws of Moses. He says he will support her and take care of her from that day until they are separated by death. It is mutually agreed by them to be man and wife, and he will clothe her and take care of her as becomes necessary from husband to wife. He further agreed that she shall share with him all his wealth, and, if any one should come and

try to take any of it from him, she shall have the preference of it. This agreement holds from this day as long as they shall live. (Signed) RAPHAEL BEHRMAN,
"DINAH BEHRMAN."

And the witness stated this was also signed by the rabbi and given to her at the time of the marriage. The defendant objected to this evidence. The objection was overruled, and defendant excepted. At this stage of the trial one Zander and one Album were sworn by the Court as interpreters, and testified that the "marriage certificate" was written in German, and the "marriage contract" in the Chaldean language, and the two were translated into English, as set out above. The State then introduced both of these papers. There was no objection to the translation, but the introduction of the documents was objected to, and the Court overruled the objection, stating to counsel (and so instructing the jury) that they were not admitted as a record of the marriage, but only to corroborate the witness as to her marriage with defendant. The defendant excepted. A picture was then shown to witness, and the translation of the indorsement thereon, which was in German, was as follows:

"To remembrance from your dear husband, Raphael Behrman, who resides in the city of Norfolk, Virginia, at No. 48 Bank street. (Signed) RAPHAEL BEHRMAN."

"Give the inclosed picture to our dear child, so that he will know his unbeknown father.
"(Signed) RAPHAEL BEHRMAN."

And she testified, under objection of defendant, that: "This is the picture of my husband. He sent it to me from Norfolk, Va., to London."—and the writing on the back was her husband's.

The picture was then introduced and admitted as evidence only to corroborate the witness as to the marriage. Defendant excepted. She stated she came from London to Norfolk because her husband sent her a "paid ticket."

Album, a witness for the State, stated (under objection) that he was familiar with the law of marriage among the Jews in Russia, and that in Riga it is left with the rabbi who gives the certificate, which is then carried to court and the Russian stamp is put upon it. He also testified that he asked defendant, while in jail, if he had married Sarah Strauch, and he said he had, and then he asked if he had married the other woman, and he said, "Yes, in Washington, D. C."

Sarah Behrman was recalled, and stated that she was familiar with the law of marriage in Russia, and that she was married according to that law.

The defendant testified, in his own behalf, that he was reared by wealthy parents in Russia, and was in the habit of going to Riga when he was sixteen or seventeen years old, and met the witness, who claimed to be his wife, in a house of ill-fame, from which he bought her for $150, and that he maintained illicit relations with her for some time, then left her and went to Hamburg, because he had reason to believe she had robbed him. She followed him there, and he had her sent back to Russia, and he then went to London, thence to Canada, and to Norfolk, and had married his wife (Fannie Kemp) in Washington City. He had never married the other woman. Knows the marriage law of Russia, and both parties have to sign the license before marriage, and he never signed any license. The picture introduced was his photograph, taken in Norfolk, but the writing on the back was not his, and he does not know how the woman got it. She was offered $300 to stop this case. She had him arrested once before, in Atlanta, Ga., and then did not appear, and he was discharged. He sent her no money to bring her from London; had never seen either of the documents set out above. Left Norfolk after his marriage with Fannie Kemp and moved to Atlanta, then to Philadelphia, Suffolk, Va., and then to Rocky Mount and Whitaker's, N. C.

The State entered a *nol. pros.* as to Fannie Kemp and introduced her as a witness. She testified that she and defendant were married in Washington City about six years ago and she had been living with him as his wife ever since.

The jury rendered a verdict of guilty, and from the judgment thereon defendant appealed, assigning error in the admission of the testimony objected to.

The Attorney General, for the State.
No counsel *contra.*

AVERY, J.: The statute provides that "the unwritten or common law of another State, or of a Territory, or of a foreign country may be proved as a fact by oral evidence." *The Code,* §1338. The plain intendment of the law is that any person who is competent to testify as to other facts of which such person professes to have knowledge shall be permitted to state the pertinent provisions of the unwritten laws of a foreign country, after having stated that he has had opportunity to learn what they are. The Legislature intended, evidently, that all persons who might profess to have an acquaintance with such laws should be permitted to testify what were their requirements as to the celebration of marriages or entering into any other contracts. It is only where by reason of peculiar skill and experience certain persons are enabled to draw inferences from facts, which the ordinary untrained mind cannot deduce, that the services of experts become desirable if not essential for the enlightenment of courts and juries. Rogers on Expert Testimony, p. 18, section 10. When the question is one addressed to the common sense and involves only the common experience and sound judgment of mankind for its solution, the opinions of experts are not admissible. Rogers, *supra*, p. 14. Whatever conflicts may have arisen between the Courts of the various States in determining whether a witness should show some special training or opportunity to become instructed in such laws (Rogers, *supra*, section 97) we are relieved from doubt and difficulty by the plain expression by the Legislature of the purpose to allow all who claim to know the provisions of foreign laws the privilege of explaining them to courts and juries. It was intended that juries should judge of the skill and intelligence of witnesses testifying upon this subject as they do when non-expert witnesses are allowed to give their opinions as to questions of sanity. Our statute, however, is but affirmative of the principle which has been laid down as the law at an early day by some of the Courts of this country. Rogers, *supra*, section 96; *Ins. Co.* v. *Rosenagle*, 77 Penn., 514; *Pickard* v. *Bailey*, 6 Foster, 171.

We find no difficulty in arriving at the conclusion that the prosecuting witness was competent to prove that she was married according to the laws of Russia, with which she said she was acquainted. It is equally clear that the writing, which she testified was signed by the defendant and herself at the time of her marriage with him, is admissible, not simply as corroborative but as substantive testimony, since, if genuine, it is a declaration of the defendant tending to establish the fact that the marriage was then celebrated. 1 Russell on Crimes, 216; *Hill* v. *Hill's Admr.*, 82 Pa. St. Reports, 513. This paper is like the English register of marriage, not a clergyman's certificate, but a paper signed by the parties. "Proof of the register there" (says CAMPBELL, J., in *People* v. *Lambert*, 5 Mich., 349—72 Am. Dec., 1) "is proof of the act of the party as much as proof of his signature to a deed would be."

After the witness testified that the words on the back of a picture of the defendant were in his handwriting and that the writing was sent to her together with the picture, the writing was competent as an acknowledgment by him of the relation subsisting between them, just as was the written statement signed by him at the time of the marriage. 21 Am. and Eng. Enc., 121.

A much graver question was raised, however, by admitting, in the face of objection, the attestation of the celebration of the marriage by the rabbi of the city of Riga, which was certified by the signature and seal of the official minister. We cannot satisfactorily dispose of this case without determining what documentary testimony can be admitted on the trial of criminal prosecutions without invading the constitutional right of a defendant to confront his accusers.

The right to cross-examine one's accusers was never held to exclude the dying declarations of one who by the act of the accused was no longer able to confront him on the trial, provided the declaration was made in the certain expectation of death. *State* v. *Mills*, 91 N. C., 581; *State* v. *Tilghman*, 11 Ired., 513; *State* v. *Williams*, 67 N. C., 12; *State* v. *Shelton*, 2 Jones, 360; *Green* v. *State*, 41 Am. Rep., 744. Where a witness, who was examined on a preliminary hearing or on a former trial of the same indictment, has since died or become insane, or is too ill to be present, or has been induced by the prosecutor or defendant to remove from the State, his testimony may be proved on a subsequent trial, when it appears that the accused was present and had the opportunity to cross-examine the witness when such testimony was delivered. *State* v. *King*, 86 N. C., 603; *State* v. *Grady*, 83 N. C., 643; *State* v. *Valentine*, 7 Ired., 225; *State* v. *Taylor*, Phil., 508. Where facts from their very nature can only be proved by a record or a duly authenticated copy of a record, proof of them does not fall within the constitutional inhibition since the genuineness of the original was determined by inspection and of the copies by an examination of the certificates, and the right to confront accusers was intended to be secured to the accused, not under all circumstances, but only where it would bring with it the benefit of testing the truth of testimony by meeting a prosecuting witness face to face and subjecting him to cross-examination. 3 Am. and Eng. Enc., 735, note; *Tucker* v. *People*, 122 Ill., 592; *State* v. *Matlock*, 70 Iowa, 229; *People* v. *Jones*, 24 Mich., 225; *U. S.* v. *Ortega*, 4 Wash., 531; *Hutchins* v. *Kimmel*, 31 Mich., 130.

Before the passage of the Act of 1823 (*The Code*, §1338) a printed copy of the acts of the Legislature of another State was not admissible in our Courts to prove its statute law, but a properly authenticated copy was competent both in civil and criminal actions. *State* v. *Twitty*, 2 Hawk., 441; *State* v. *Patterson*, 2 Ired., 346. Upon the principle that we have stated it has been held by this Court that a deed duly proved and registered is competent evidence to show the transfer of land, whenever it may become material to do so either in the trial of civil or criminal actions. *State* v. *Shepherd*, 8 Ired., 195.

It is conceded that if the paper offered had been a properly authenticated copy of a record of marriage required to be kept in a sister State, it would have been competent in a criminal prosecution. But it is needless to pass upon the question whether authenticated copies of marriage records of foreign countries would be competent evidence in any criminal case, since the paper admitted purports to be the original certificate of the rabbi, verified by the signature and seal of the official minister, and unless this Court is bound to know the signature and seal of that official, and that he is the custodian of marriage records, the paper must be considered, not as a record, but merely as an original certificate offered in connection with the testimony of the witness that she was married to the defendant at the date mentioned in the paper—the appended writing being but the extra official statement of a private person. 1 Greenleaf Ev., sections 493 and 498. At an early period of our national history it was held that the record of a foreign Court could not be authenticated by the signature of even an American Consul resident in such country (*Church* v. *Hubburt*, 2 Cr., 165 [187]), and subsequently a statute was passed which empowered and made it the duty of a Consul of this Government to keep a record of marriages celebrated in his presence and send copies to a specified office in this country. Rev. Stat. of U. S., sec. 4082. If the paper offered is not competent because not properly authenticated, as an official record, it was not admissible at all as documentary evidence of the marriage, because, as was said in *People* v. *Lambert*, *supra*, a certificate merely signed by a minister, while perhaps it may avail in civil proceedings if properly supported, cannot avail in criminal cases where the defendant is entitled to confront his witnesses. *Gaines* v. *Relf*, 12 How., 472.

The defendant was accused of an infamous crime, and in such cases it was said by PEARSON, C. J., in *State* v. *Thomas*, 64 N. C., 76, that the word "confront" was intended not simply to secure to the defendant "the privilege of examining witnesses in his behalf," but was "in affirmance of the rule of common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted—that is, put face to face." In that case the State offered certain entries made by a station agent in the books of a railroad company, when said agent was in the State of Virginia, to show that the cotton, in reference to which it was charged that a perjury had been committed, had been received by the defendant. The books were kept by the company as evidence of the conduct of its business and were identified, but the statements recorded in them were, when offered on behalf of the prosecution, but the written declarations of the agent. His testimony was the highest evidence of the transaction, but could be heard without the consent of the accused only when delivered *viva voce* in his presence.

But, while the paper was not admissible as a record or an independent declaration of the rabbi, we think it was made pertinent and competent evidence, even in a criminal prosecution, by the testimony of the witness that it was given to her at the very time of the marriage. While the certificate thus given may tend, when admitted, to support the testimony of the witness to the fact of marriage, it is competent only as a part of the *res gestæ*, being a declaration made in the presence of the defendant and accompanying the act of solemnizing the rite, if it did not constitute a part of the ceremony. 1 Bish. on Mar. and Div., sec. 1006. It is true that the criminal act charged was the second marriage, but evidence of words or acts accompanying and reflecting light on any transaction which becomes material in the progress of a trial is admissible as *res gestæ*. 1 Roscoe, star p. 26; Best on Ev., 663. It would have been competent for the witness to repeat all that was said by the rabbi in celebrating the rite. It was equally admissible to show his declaration, oral or written, in the presence of both, that they were lawfully married, as an immediate result of what was done. 21 Am. and Eng. Enc., 99 and 102, note 1.

The paper was admitted on the trial as corroborative, not as substantive evidence. There is no principle upon which such testimony amenable to the constitutional objection which we have discussed, if offered as substantive evidence, can be permitted to go to the jury in corroboration of a direct witness to the main point to which it relates. A declaration excluded by the Constitution, as in violation of individual right, will not be allowed to accomplish indirectly what it is not permitted to do directly—lead a jury to believe that a marriage was celebrated when the guilt of the accused hinges upon the question of its solemnization.

We have been led into this discussion because it is important to understand clearly how this declaration is admissible under the peculiar circumstances, while it would ordinarily be excluded on the trial of criminal prosecutions as hearsay, or for the reason that it falls within the constitutional inhibition imposed for the protection of persons accused of crime.

The defendant has no just ground for complaint if the jury were allowed to consider a paper which was admissible as a part of the transaction only for the purpose of corroborating the witness as to the fact of the marriage.

Judgment Affirmed.

CLARK, J., concurring: There was objection to Album testifying, but no exception was taken nor is any ground assigned for the objection. If the objection was that he was not sufficiently qualified as an expert, the finding of the Judge below is conclusive. *State* v. *Davis*, 63 N. C., 578; *Smith* v. *Kron*, 96 N. C., 392; *State* v. *Hinson*, 103 N. C., 374; *State* v. *Brady*, 107 N. C., 822. He is presumed to have so found if the witness was admitted as an expert. If the objection was that the witness was not an expert, that ground is not assigned and the Court is not to presume that there was error. In truth, however, *The Code*, §1338, providing that the common law of another State or country may be proved as *a fact* by oral evidence, would seem to indicate that expert evidence would not be requisite. If so, when the witness testified that he knew the law as to marriage among the Jews in Russia he was competent to testify what it was, leaving his credibility to be tested by a cross-examination as to his means of information, whether he had lived in Russia, etc. It does not appear that he had not lived there, and his testimony would indicate that he had. But if he had not, it would have remained for the jury to say what credit should be given to his evidence. He may have acquired such knowledge by reading or otherwise, just as the same witness was admitted as a competent interpreter of German and Chaldaic without showing that he had lived either in Germany or Chaldea.

SHEPHERD, C. J., dissenting: I cannot assent to the broad proposition that any person who simply professes to have knowledge of the unwritten laws of a foreign country, and who merely states that he has had an opportunity of learning them, is a competent witness in respect to their requirements as to the celebration of marriages or the entering into other contracts. Our statute, providing that such laws "may be proved as a fact by oral evidence" is but in affirmance of a general principle laid down in the works on evidence (1 Greenleaf Ev., 486; 1 Wharton Ev., 303), and very clearly does not change in the slightest degree the existing rules as to the competency of witnesses by which such laws are to be established. This is plainly manifest by the declaration of this Court in *Moore* v. *Gwyn*, 5 Ired., 187 (a case decided long after the statute was enacted), that "the existence of such a law could be proved only by the opinions of persons learned in that law." It would, it seems to me, be a novel thing in our jurisprudence to allow a plaintiff suing in the Courts of North Carolina upon a contract made in another State or country to testify not only to the terms of the contract, but also to *lex loci contractus*, upon his bare statement that he is familiar with such law. In the decisions of this Court it will be seen that only professional witnesses have been examined, but the rule in this respect has been relaxed to some extent in other jurisdictions and it has been laid down, as stated in *Insurance Co.* v. *Rosenagle*, 77 Pa., 514 (cited in the opinion of the Court), that "the law of a foreign country on a given subject may be proved by any person who, though not a lawyer or not having filled a public office, is or has been in a position to render it probable that he would make himself acquainted with it." This view seems to have been adopted by many of the Courts, but it is surely no authority in support of the rule as stated in the opinion in this case. In the case above mentioned there was much more than the statement of the witness that he was familiar with the laws of a foreign country. He was a resident of that country, and he testified that he was the Catholic dean and parson at Odenheim, and that as such he was the proper custodian of the records of births, baptisms, marriages and deaths of the parish. He was permitted to testify that the records had been kept according to the laws of the country. The Court said: "It was his duty to know, and he testified that he did know, the law relating to the records in his charge. His knowledge was just that which the responsible head of a public office would be assumed to have of the law which had controlled the past operations of his department." Equally inapplicable, I think, is the point of decision in *Pickard* v. *Bailey*, 6 Foster, 171, the other case cited in the opinion. In that case the witness had acted as a magistrate in Canada and had also been extensively engaged in mercantile business there, and in such employment had become acquainted with the law in relation to notarial instruments. He was held competent to testify that it was the sworn duty of every notary not to suffer any original paper executed before him to be taken out of his custody, and that notarial instruments are received in all the Courts in Canada without further proof of the execution of the original. These cases are similar in principle to those cited in Rogers on Expert Testimony. That author states that "in order to prove the law of a foreign country it is necessary that the witnesses produced to testify in respect to it should be *more* than ordinarily capable of speaking upon the subject" (sec. 96), and the cases cited by him also establish the proposition that the knowledge must be acquired in the foreign country, Sec. 100; see also, 1 Bishop Marriage and Divorce, 1123.

Applying these principles to the present case, I am very certain that the testimony of the witness Album should not have been received. All that the witness stated as to his competency was "that he was familiar with the law of marriages among the Jews in Russia." He does not state how he acquired such knowledge nor does it appear that he was ever in Russia in his life. For aught that appears in the record he may have been born and raised in the county of Edgecombe, and it is not pretended that he witnessed the marriage. His testimony, therefore, is opinion evidence only, and I am unable to see why any other resident of said county is not as competent to testify to the law of Russia, provided he simply states that he is familiar with its laws.

Had this witness testified to the *fact* of the marriage and that it was solemnized in the manner usual and customary in Russia by a person duly authorized to celebrate the rites of matrimony, and the parties afterwards lived together as man and wife, his testimony would have been competent, and it would have been unnecessary to offer any further evidence of the law in order to establish the marriage. 1 Bishop, *supra,* 1122. "And there is almost authority," remarks Mr. Bishop, *supra*, 1124, "for saying that any *inhabitant* of a foreign country may be a witness to its marriage laws, because, as judicially observed (*Wottrich* v. *Freeman*, 71 N. Y., 601), all residents of a country of marriageable age and ordinary understanding are familiar with the usual and customary forms of marriage." The contrary was held in England, but the rule would seem to be in the line of public convenience and policy. However this may be it is not applicable to this case, as we have seen that notwithstanding the defendant's objection the witness was not qualified in any way to testify as to the laws of Russia nor was it shown that he was a Russian or that he was ever in that country.

Without discussing the subject further I conclude that under the most liberal rules to be found in the text-books or decided cases the witness Album was incompetent and that his testimony should have been excluded. I am also of the opinion that the general proposition that not only the law of marriage but all other unwritten laws can be proved in such a loose and unsatisfactory manner is dangerous in its consequences and contrary to our own decisions as well as the consensus of judicial authority.

It is proper to say that the witness "testified under objection" and defendant moved for a new trial upon the ground of error in admitting improper testimony. The Attorney General made no point as to the formality of the exception, and the admissibility of the testimony was fully argued by him.

STATE v. A. J. BAKER.

(APPEAL BY PROSECUTOR YOUNG).

Prosecution of Criminal Action—Public Interest—Costs of Prosecution of Criminal Action, when prosecutor taxed with.

1. A finding by the trial Judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest."
2. In such case the person marked as prosecutor on a bill before it was acted on by the grand jury was properly adjudged liable for the costs.

The defendant was indicted for disposing of mortgaged property, and, upon his trial before *Hoke, J.*, and a jury, at Fall Term, 1893, of WILSON Superior Court, was acquitted.

The Court found that the prosecution was not for the public interest, and adjudged that the prosecutor, C. A. Young, of the firm of C. A. Young & Bro., who was marked on the bill as prosecutor, should pay the costs, whereupon he appealed.

The Attorney General, for the State.

No counsel *contra.*

PER CURIAM: It was found by his Honor that the prosecution in this action "was not for the public interest," which was equivalent to a finding that it "was not required by the public interest." That is conclusive. *State* v. *Roberts,* 106 N. C., 662. The appellant, C. A. Young, was marked as prosecutor on the bill before it was acted on by the grand jury, and it was proper under those circumstances that he should be adjudged to be liable for costs to the exoneration of the county. *The Code*, §737; *State* v. *Hamilton*, 106 N. C., 660. Affirmed.

STATE v. WILLIAM STATON.

Indictment for Arson—Criminal Law—Evidence—Witness—Refreshing Memory from Memorandum—Evidence of Character.

1. Where a witness is impeached, either by contradictory testimony, on cross-examination, or by attack upon his character, his declarations to a third person, made soon after the transaction, may be stated by himself and afterwards shown by such third person in way of corroboration.
2. A witness may be compelled, at the instance of a party who is examining him, to inspect a writing which is present in court and in his own handwriting, or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates.
3. Where a writing relates to collateral matters and a defendant on trial could derive no benefit from compelling a witness for the prosecution to inspect it, the refusal of the Court to compel witness to refresh his indistinct recollection of the matter is a harmless error and not reversible.
4. Where, in a trial of defendant for arson, the prosecuting witness testified that the defendant told him that he sold the cotton taken from the barn to W., who was neither a party nor witness, it was not error to refuse to allow the defendant to prove that W. was a man of good character.

INDICTMENT for burning a barn, tried at January Term, 1894, of PITT Superior Court, before *Bynum, J.*

There was a judgment against the defendant, imprisoning him in the Penitentiary for five years, from which he appealed.

The facts are sufficiently adverted to in the opinion.

The Attorney General, for the State.

No counsel *contra*.

AVERY, J.: It is needless to cite authority to sustain the familiar rule of evidence, that where a witness is impeached either by contradictory testimony, cross-examination or an attack upon his character, his declarations made soon after the transactions to a third person may be stated by himself and afterwards shown by such third person in order to corroborate him. *State* v. *Whitfield*, 92 N. C., 831; *State* v. *Rowe*, 98 N. C., 629.

A witness may be compelled, at the instance of a party who is examining him or cross-examining him, to inspect a writing, which is present in the court, if the writing is in his handwriting, or it appear otherwise that there is reason to believe that by reading it his memory may be refreshed so as to enable him to recollect clearly the transaction as to which he is testifying. 1 Greenleaf on Ev., section 436. If he recollects, after such inspection, to have seen the writing before, he may even be allowed to testify that at the time he last saw it or when he wrote it himself, he knew the contents to be correct, though he now has no independent recollection of the facts. 1 Greenleaf, section 437. It was therefore error to refuse to allow the memory of the witness Thigpen to be tested by causing him to look at his own memorandum of the testimony heard on the preliminary trial, in order that after such examination it might appear whether he would either have an independent recollection of the facts or would be able to state that the memorandum was made correctly. If the paper had been offered as testimony to contradict the witness for the prosecution we would have been confronted with the grave question whether a deposition, or memorandum of evidence, offered either for the State or the defendant, is admissible unless it appear to have been written at the time of the examination and in the presence of the accused and to have been signed by the witness. *State* v. *Valentine*, 7 Ired., 227; *State* v. *Grady*, 83 N. C., 645; *State* v. *Bridgers*, 87 N. C., 562; *State* v. *Thomas*, 64 N. C., 74; *The Code*, §§1144 and 1150. Conceding, however, that it is simply the declaration of the Justice made on the next day, when he was nearer to the transaction and his memory was possibly more distinct, it was the right of the defendant to demand that he inspect it in order to refresh, if possible, his indistinct recollection. 1 Greenleaf, section 437.

But if the witness had read the memorandum and had thereupon stated that he was enabled thereby to recall more distinctly the testimony of the detective, Rowe, and had modified his own evidence, after so refreshing his memory so as to bring it in perfect accord with the memorandum—the Attorney General insists that no material conflict would even then have been shown between the testimony of Rowe on the trial and on the previous hearing—certainly no discrepancy that was not made equally to appear by the evidence of the magistrate as admitted. If the defendant could have derived no benefit from compelling the witness to inspect the paper the error was of course harmless.

The witness Rowe testified on the trial that he did not give the name of the store at Penny Hill which defendant proposed he should break into, but that he thought it was Chase's store. The memorandum of Thigpen represents him as testifying that the defendant said to him: "Now pretty soon everybody will go out of Hicks' store and there will be nobody there but a little boy about thirteen or fourteen years old, and there is about $62 in the drawer, and we can go in and you can take hold of the boy and put your hand over his mouth and keep him from hallooing. I know where the money drawer is and will go and break the drawer open," etc. The witness Rowe testified also that defendant said there was about $70 in the drawer, whereas both the testimony of Thigpen and the memorandum represent him as testifying at the previous hearing that the sum was $62 or $63. The exception had its origin in the failure of Thigpen to recollect whether on the former trial Rowe said he had a conversation with the defendant before or after he left his valise at Stancill's store and from a proposition that upon this point he should refresh his memory. The testimony of Rowe as to the declarations of the defendant in reference to breaking into any store was not necessarily material to the inquiry whether he burned the house, as charged in the indictment. If objected to the testimony would only have become material as explanatory of the ruse used by the witness to win in so short a time the full confidence of the defendant. Without recurring to his notes, Thigpen testified that on the examination the witness Rowe had stated that the defendant told him there was $62 or $63 in the drawer, thus contradicting Rowe. It does not appear in any way, however, why it was at all important to the proper conduct of the defence to inform the jury at what time the valise was deposited at Stancill's. If all these facts were collateral—had no bearing upon the issue of the guilt or innocence of the defendant—it is familiar learning that no evidence could have been offered to contradict a witness in relation to collateral matters even when put upon his guard on his examination in chief unless where the evidence tended to show temper, disposition or conduct of the witness toward the cause or the parties. *State* v. *Patterson*, 2 Ired., 246. If the memorandum shows no conflict in the material portions of the testimony of the prosecuting witness as delivered on the two occasions, it is not competent to contradict him by other testimony at all without putting him on his guard, nor after taking that precaution unless the contradictory testimony tends to show bias. It was incumbent on the defendant, it seems to us, too, to have pointed out the particular fact as to which he proposed to refresh the memory of the magistrate and to have made it appear to the Court how he might have contradicted the witness for the State as to material statements made by him. The memorandum, if it had been admitted as substantive evidence, would not have shown any contradictory statement of the prosecuting witness as to the confession of the defendant that he burned the building, and the declarations of the defendant as to other matters were collateral and immaterial. If it had been material to show that the witness stated on one occasion that he deposited his valise behind Stancill's store, and on another that he placed it, at a certain stage in the consultation with Staton, behind that store, the admission of the memorandum would have failed to accomplish that object since it does not appear from the Justice's notes where he first left his valise, whether in or behind Stancill's store. In fact, the Court was asked to allow the witness to refresh his memory upon this particular portion of the testimony only, and the error in refusing to do so would seem to be harmless if the memorandum would have shown no contradiction as to the place of depositing the valise.

The prosecuting witness having testified that the defendant told him that he sold the property (cotton) taken out of the barn that he had burned to one Warren, the Justice, Thigpen, on his cross-examination was asked if he knew Warren and upon his answering in the affirmative the defendant proposed to prove by him that Warren was a man of good character. Warren had not been introduced and, so far as the record shows, was not examined as a witness. Unless a defendant in the trial of a criminal prosecution puts his character in issue either by becoming a witness or offering testimony to show that it is good, it is not competent for the State to impeach it, and while the character of a witness may be shown for the purpose of sustaining or impairing the force of his testimony, it does not tend to enlighten the jury upon the question of guilt or innocence to know whether a person, who is neither party nor witness, but is only mentioned in the confession of one accused of crime as the receiver of stolen goods, is of good or bad reputation. *State* v. *Davis*, 92 N. C., 764; *State* v. *Thomas*, 98 N. C., 599; 1 Greenleaf Ev., section 52; 1 Roscoe, star pp. 102 and 103.

We conclude, therefore, that there was no error which entitles the defendant to a new trial.

Judgment Affirmed.

STATE v. RUFUS WHITAKER et al.

Writ of Prohibition, nature and purposes of—Violation of Town Ordinance—Trial by Jury—Appeal—Practice.

1. The writ of prohibition which existed at common law and is authorized by Art. IV, sec. 8 of the Constitution, can only be issued from the Supreme Court.
2. The writ of prohibition does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal, *recordari* or *certiorari*, and hence will not issue to prevent a Mayor's Court from proceeding to try a warrant for an alleged violation of

a city ordinance, where such Court has jurisdiction of the persons and subject-matter and the alleged invalidity of the ordinance can be determined on appeal.

3. The guaranty of a trial by jury in the sixth and seventh amendments to the Constitution of the United States applies only to the Federal Courts, and is not a restriction on the States, which may provide for the trial of criminal and civil cases in their own Courts, with or without jury, as authorized by the State Constitution.
4. Under Art. I, sec. 13 of the Constitution of North Carolina, the Legislature may provide for the trial of petty misdemeanors in inferior Courts without a jury, provided the right of appeal is preserved.
5. Where a petition for a writ of prohibition is entertained the usual practice, unless prior notice of the petition has been given, is to issue a notice to the lower Court to show cause why the writ should not issue and to stay proceedings in the meantime.

(Discussion by Associate Justice CLARK of the nature, purposes and effect of the writ of prohibition and the practice in relation thereto).

The defendants applied for a writ of prohibition to issue to Thomas Badger, Mayor of the city of Raleigh, upon the ground that the city ordinance for the violation of which they were being tried was invalid and because a trial by jury had been refused them.

Messrs. T. M. Argo and *J. C. L. Harris*, for petitioners.

CLARK, J.: The writ of prohibition existed at common law and is also authorized by the constitutional provision (Art. IV, sec. 8) which gives the Supreme Court "power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior Courts." In this State this writ can issue only from the Supreme Court. *Perry* v. *Shepherd*, 78 N. C., 83.

The writ of prohibition is the converse of mandamus. It prohibits action, while mandamus compels action. It differs from an injunction, which enjoins a party to the action from doing the forbidden act, while prohibition is an extraordinary judicial writ issuing to a Court from another Court having supervision and control of its proceedings, to prevent it from proceeding further in a matter pending before such lower Court. It is an original remedial writ and is the remedy afforded by the common law against the encroachment of jurisdiction by inferior Courts and to keep them within the limits prescribed by law. 19 Am. and Eng. Enc., 263, 264; High Extraordinary Rem., sec. 762.

It is settled that this writ does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal or by *recordari* or *certiorari* in lieu of an appeal. Nor is it a writ of right, granted *ex debito justitiæ*, like *habeas corpus*, but it is to be granted or withheld according to the circumstances of each particular case. Being a prerogative writ, it is to be used like all such, with great caution and forbearance to prevent usurpation, and secure regularity, in judicial proceedings where none of the ordinary remedies provided by law will give the desired relief, and damage and wrong will ensue pending their application. High on Extraordinary Remedies, secs. 765, 770.

In the present case the Mayor's Court has jurisdiction of the persons of the defendants and of the subject-matter, which is the alleged violation of a town ordinance. If the ordinance in question is invalid that matter can be determined on appeal to the Superior Court, and by a further appeal (if desired) thence to this Court. This has been often done. There is no palpable usurpation of jurisdiction or abuse of its authority, nor likelihood of injury to defendants, which calls for the extraordinary process of this Court by prohibition to stop the action of the lower Court. It is more orderly to proceed in the regular way to have an alleged error of this kind corrected on appeal. The writ might properly issue where the Court below has no jurisdiction of the subject-matter, as, for instance, if a Justice of the Peace should attempt to try a defendant for larceny, or decree foreclosure of a mortgage; but even in that case it would rest in the discretion of the Supreme Court whether the matter should be left to correction by appeal or by treating such judgment as a nullity. As to the denial of a jury trial by the Mayor, it is pointed out by SMITH, C. J., in *State* v. *Powell*, 97 N. C., 417, that under the present Constitution (Art. I, section 13) the Legislature is authorized to vest the trial of petty misdemeanors in inferior Courts without a jury if the right of appeal is preserved. It was otherwise under the former Constitution, under which *State* v. *Moss*, 47 N. C., 66, was decided. The guaranty of a trial by jury in the sixth and seventh amendments to the Constitution of the United States applies only to the Federal Courts, and is not a restriction on the States, which may provide for the trial of criminal and civil cases in their own Courts, with or without jury, as authorized by the State Constitution. Cooley Cons. Lim. (6th ed.), 30; *Walker* v. *Sauvinct*, 92 U. S., 90; *Munn* v. *Illinois*, 94 U. S., 113.

There are instances, though infrequent, when this writ has been invoked. It has been granted where, after a conviction for felony, the Court has at a subsequent term granted a new trial upon the merits, without any legal authority for so doing. *Quimbo Appo* v. *The People*, 20 N. Y., 531. It is also the appropriate remedy pending an appeal from an inferior to a Superior Court, to prevent the former from exceeding its jurisdiction by attempting to execute the judgment appealed from; or to prevent a Circuit Court exceeding its powers by issuing an unauthorized writ of error and *supersedeas* to a County Court and interfering improperly with the jurisdiction of the latter. *Supervisors* v. *Gorrell*, 20 Grat., 484. Also, to prevent an inferior Court's interfering with or attempting to control the records and seal of the Superior Court by injunction. *Thomas* v. *Meade,* 36 Mo., 232. It lies to prevent a Probate Court exercising jurisdiction over the estate of a deceased person when it cannot lawfully do so. *United States* v. *Shanks,* 15 Minn., 369. Or, where Justices of the Peace are proceeding without authority of law to abate a supposed nuisance, prohibition lies to stay their action. *Zylstra* v. *Charleston,* 1 Bay, 382. These are cited as illustrations, but in each case it is in the discretion of the Supreme Court whether the writ shall be granted.

Prohibition does not issue to restrain ministerial acts, but only to restrain judicial action where the latter would be a usurpation and cannot be adequately remedied by an appeal. 19 Am. and Eng. Enc., 268, 269. It issues to and acts upon Courts as an injunction acts upon parties, and like an injunction it does not lie where adequate remedy can be had by the ordinary process of the Courts. When entertained the usual course, unless prior notice of the petition has been given, is to issue a notice to the lower Court to show cause why the writ should not issue and to order a stay of proceedings in the meantime. 19 Am. and Eng. Enc., 280, 281.

In the present case if the defendants are convicted upon an invalid ordinance there is ample remedy by appeal. The Constitution does not guarantee a jury trial in such case, since the defendants have the right of appeal. If there is aught in the charter of the city which grants the defendants a trial by jury, if demanded, the error in the refusal could be corrected by a jury trial in the Superior Court. There is no emergency which requires the Court to issue the writ prayed for. Petition Denied.

STATE v. J. H. DANIEL.

False Pretenses, what constitutes—Opinion.

1. To be indictable the false pretense must be of some existing fact in contradistinction alike from a mere promise or a mere opinion; therefore,
2. Where defendant obtained a bottle of medicine from another by false representations that it was too strong to be applied on the face of such other, he cannot be held guilty of obtaining goods under false pretenses.

Indictment, tried at September Term, 1893, of Wake Superior Court, before *Shuford, J.*

The indictment was as follows:

"The jurors for the State, upon their oaths, present that J. H. Daniel, late of the county of Wake, wickedly devising and intending to cheat and defraud, on the 27th day of August, 1893, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly and feloniously did, unto one Mark Barker, falsely pretend that certain medicine, to-wit, one ounce thereof in the possession of the said Mark Barker, was too strong to be applied to a sore on the face of the said Mark Barker, whereas in truth and in fact the said medicine was not too strong to be applied to the sore aforesaid; by means of which said false pretense he, the said J. H. Daniel, feloniously, knowingly and designedly did then and there unlawfully obtain from the said Mark Barker the following goods and things of value, the property of said Mark Barker, to-wit, one ounce of medicine, with intent then and there to defraud, against the form of the statute," etc.

After a verdict of guilty the defendant moved in arrest of judgment because the bill did not charge an indictable offence, but merely the expression of an opinion as to the strength of the medicine.

The Court overruled the motion and pronounced judgment, and the defendant excepted and appealed.

The Attorney General, for the State.

Messrs. Alexander Stronach and *Thomas M. Argo*, for defendant.

MACRAE, J. (after stating the facts): The recognized rule is that "the false pretense must be of some existing fact in distinction alike from a mere promise or a mere opinion." 2 Bish. Cr. Law, sec. 429. Among other authorities the author cites the case of *State* v. *Jones*, 70 N. C., 75, where the defendant sold a barrel containing chips and dirt covered with turpentine as a barrel of turpentine. He proceeds at section 450: "But when we depart from such cases as these and come to those in which it is uncertain whether what seems to be fact is not mere opinion, the difficulties of our present inquiry increases," and at section 454: "Now, a mere opinion is not a false pretense, but any statement of a present or past fact is one, if it is false."

In *State* v. *Hefner*, 84 N. C., 751, in discussing a motion in arrest, ASHE, J., says: "The defendant falsely stated that there never had been anything the matter with the eyes of the mare. If he had simply stated that the eyes of the mare were sound this would have been nothing more than the expression of an opinion, which we think would not have come within the statute; but when he says there never has been anything the matter with them this is a fact, and when it is negatived and proved that her eyes were diseased and had been operated upon for "the hooks" within the knowledge of the defendant, it is the false representation of a fact, and is a false pretense within the statute."

So, it was held in *State* v. *Young*, 76 N. C., 253, that a false representation that certain cotton was "good middling" in grade was held not an indictable offence, although it is but fair to say that the reason assigned by the Court was that the quality of the cotton was a matter of observation and the maxim *caveat emptor* would apply.

It was held in *State* v. *Holmes*, 82 N. C., 607, that such representation that a horse was sound and healthy, and in *State* v. *Lambeth*, 80 N. C., 393, that it was "all right," were not indictable.

This subject has been as thoroughly investigated by this Court, as will appear by the frequent decisions bearing thereon, as any criminal matter that has been before it, and the law is entirely well settled. That which has been recognized as the leading case, and has been cited in nearly every opinion since delivered, is *State* v. *Phifer*, 65 N. C., 321, where Mr. Justice READE in a remarkably lucid opinion exhausts the subject. In this opinion he approves the conclusion of Chief Justice HENDERSON in *State* v. *Simpson*, 3 Hawks, 620, although he dissents from the reason upon which it was held that the bill in that case did not charge an indictable offence. It charged that defendant (A.) unlawfully, etc., did falsely pretend to one M. W. Piner that said A. wished to see a certain judgment which he, the said M., had obtained against him, the said A., before a Justice of the Peace, etc., and that he, the said A., wished to see said judgment for the purpose of ascertaining the amount due thereon and for the purpose of paying the same, etc. It was held by Judge HENDERSON that the Act of 1811 concerning the use of false tokens or pretenses requires that the cheat should be accomplished by means of some *token* or false *contrivance* calculated to impose upon the credulity of ordinary men: a mere lie was not in the contemplation of the Legislature. Justice READE in discussing this case reaches the conclusion that the offence was not indictable, because it was more in the nature of a false promise than a false representation of a fact. The case last cited is very much like that which is before us—the representation of defendant being that the medicine was too strong for further use and the inference being that it was his intention to temper or weaken it. And in this view we might well hold that the judgment ought to have been arrested. But the stronger ground is that in no case in North Carolina, or anywhere else that we have been able to find, has it ever been held that a false expression of opinion alone is indictable. The only question left, then, is whether the representation alleged to have been falsely made by defendant was a mere opinion or a statement of a fact. It seems to us that it can only be construed to be the expression by defendant of his judgment of the effect of the medicine upon the sore for the healing of which it had been applied. Too strong for what? For the sore it was intended to heal. This was a matter of professional judgment and necessarily an opinion. It was impossible to be stated as an abstract fact. And it would be too harsh a rule to hold the physician or the lawyer to criminal account for a statement upon a professional question when it turned out that his judgment was at fault, and by reason thereof his patient or his client had been injured. Especially so when it has been so often held that such expressions by non-professional persons as to conditions and qualities of goods or animals are only their opinions, and not indictable.

It will not be necessary to review the many cases in this Court where the principle has been applied to differing circumstances, but where, in every instance in which the indictment was upheld, there was a false representation of a subsisting fact. Leaving the other exceptions upon the motion for a new trial, we hold there was error.

Judgment Arrested.

STATE v. JOHN T. RIDLEY.

Criminal Jurisdiction—Conviction and Judgment—Collateral Attack—Perjury.

1. The Superior Court has general jurisdiction of all assaults and batteries.
2. Where an indictment, found in October, 1893, charged that on the 1st of July, 1893, defendant made an assault with a deadly weapon, to-wit, a certain rock, knife and brickbat, want of jurisdiction did not appear, for, time not being of the essence of the offence, the charge would have been sustained and the jurisdiction maintained by proof of a simple assault more than one and less than two years from the finding of the indictment.
3. Where the jurisdiction of the Court is voidable by matter *de hors* the record, but no defect of authority appears upon an inspection of the record of an indictment, trial and conviction, such a record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted though it was not defeated.

INDICTMENT for perjury, tried before *Shuford, J.*, and a jury, at January Term, 1894, of DURHAM Superior Court.

On the trial it appeared that at a previous term of the Court the defendant and his wife were tried for an assault and battery upon one Dooms, and that the defendant had testified in that trial that he had no knife in his hands during the fight with Dooms, but that he struck Dooms several times with his fist. The fight occurred about July 1, 1893, and the indictment for the assault was at October Term, 1893, which charged that the defendants therein, John and Rosa Ridley, did assault Dooms with a deadly weapon, to-wit, "a certain rock, knife and brickbat."

On the trial of this indictment for perjury witness testified that John Ridley did have a knife in his hand, but did not attempt to strike Dooms with or to use it. Witness for the defendant testified that he had no knife or other weapons in his hands at the time of the fight.

The defendant requested the Court to charge (among other things) as follows: "That the indictment in the criminal action entitled the State of North Carolina against John Ridley and Rosa Ridley, charged an assault and battery with a certain deadly weapon, to-wit, a rock, a knife and a brickbat, and having charged that the said assault and battery was committed on July 1, 1893, and the said indictment having been found upon a warrant at October Term, 1893, of the Superior Court of Durham County within six months of the time of the commission of the alleged assault and battery, the Superior Court had no jurisdiction of said offence and the defendant is not guilty."

The defendant was convicted, and appealed, assigning as error the refusal of the instruction prayed for.

The Attorney General, for the State.

Mr. H. A. Foushee, for defendant (appellant).

AVERY, J.: The Superior Court has general jurisdiction of all assaults and batteries, and where, in an indictment found in October, 1893, the charge was that the defendant "on the first day of July, 1893, did unlawfully assault, beat and wound one Henry Dooms with a deadly weapon, to-wit, a certain rock, knife and brickbat," etc., if the description of the weapon had been omitted altogether it would not have appeared from the indictment that there was a want of jurisdiction, because, time not being of the essence of the offence, the charge would have been sustained and the jurisdiction maintained by proof of a simple assault more than one and less than two years before the said first day of July, 1893. To sustain an indictment for perjury it is necessary to show that the Court had jurisdiction of the subject-matter of the inquiry. But where the Court had general jurisdiction (which in this case was exercised, culminating in conviction), and there are circumstances which, if they had been shown, would have made a particular case an exception to the general rule, a defendant convicted on a former trial, wherein he is charged to have committed perjury, cannot re-open the case in which he was tried, and show as matter of defence against the charge of perjury the circumstances that would, if proved on the trial, have ousted the jurisdiction of the Court. It is too late to question the right of a Court to take cognizance after conviction, and when there is nothing on the face of the record that gives rise to any doubt as to the jurisdiction, and this is true even though a new trial may have been granted for error of the Court. 2 Bish. Cr. Law, sec. 1028 (5). In such a case it must be conclusively presumed that the defendant offered no evidence to defeat the jurisdiction, because he could not. The oath cannot be deemed extra judicial while the conviction and judgment of a Court of general jurisdiction are still undisturbed and upon the face of the record appear to be valid, not void. 1 Bishop, *supra*, sec. 440 (4). The question is whether the jurisdiction existed, not whether it might, by the introduction of extrinsic facts on the trial, have been defeated. 18 Am. and Eng. Enc., 303; *State* v. *Wyatt*, 2 Hogan, 219; 2 Wharton Cr. Law, sec. 1258.

It may be said generally that where the jurisdiction of the Court is voidable by matter *de hors*, but no defect of authority appears upon an inspection of the record of an indictment, trial and conviction, such a record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted, though it was not defeated. 1 Bishop, *supra*, sec. 1028.

Upon the face of the record it does not appear that it was essential or material even to have proved on the trial the commission of any offence other than a simple assault committed more than one and less than two years before the finding of the indictment. It is needless therefore to discuss the question whether a knife, a brickbat or a rock (any one of the three) is *per se* and without special proof of its character or dimensions a deadly weapon. The presumption that the defendant was convicted of the assault and in the exercise of the rightful authority of the Court is, for the purposes of this trial, conclusive. It might have been material to know whether the defendant had a knife in his hand at any time during the progress of the fight in order to determine whether he entered into the conflict willingly and thereby became guilty of a simple assault. We are warranted in assuming from the testimony offered, without entering into a trial *de novo* of that indictment, that it did become material to show that the defendant, John Ridley, had a knife in his hand, though he may not have used or attempted to use it.

There was no error in refusing the instruction asked.

No Error.

STATE v. CHARLES HARRIS.

Appeal in Forma Pauperis—Insufficient Affidavit—Practice—Certiorari.

1. It is for the Legislature to provide the requirements and restrictions as to appeals without giving bond, and when not complied with the Courts have no right to disregard the statute, and the allowance of a motion to dismiss an appeal in such cases is a matter not of discretion but of right; therefore,

2. Where the case on appeal shows the defendant prayed an appeal and "upon filing his affidavit of his inability to give security for the cost of the appeal" was allowed to appeal without bond, the appeal will be dismissed on motion.
3. Where an appellant has ground for a *certiorari* he should move for it before the case is reached for argument.

The defendant was convicted of LARCENY at November Term, 1893, of GRANVILLE Superior Court, before *Winston, J.*, and was allowed to appeal without giving bond for costs.

In this Court the Attorney General moved to dismiss for want of appeal bond.

The Attorney General and *Mr. T. T. Hicks*, for the State.
Mr. J. W. Graham, for defendant.

CLARK, J.: The case states that the defendant prayed an appeal to the Supreme Court and "upon filing his affidavit of his inability to give security for the cost of the appeal" was allowed to appeal *in forma pauperis*. These are almost the very words used in *State* v. *Jones*, 93 N. C., 617, in which the motion of the Attorney General to dismiss was allowed. The subject is discussed and this precedent is followed in the late case of *State* v. *Jackson*, 112 N. C., 849. Had the recital been simply that "upon affidavit filed" the defendant is allowed to appeal without giving bond, there would perhaps have been a presumption that the affidavit contained the statutory requirements. But when the substance or purport of the affidavit is set out and the Court sees that it is insufficient, the appeal must be dismissed. An appeal without giving bond is only allowable in cases provided by statute. It is for the Legislature to provide the requirements and restrictions as to such appeals, and when not complied with the Courts have no right to disregard the statute. *State* v. *Rhodes*, 112 N. C., 856. In such cases the motion of the Attorney General to dismiss is not a matter of discretion but a right. *State* v. *Morgan*, 77 N. C., 510; *State* v. *Payne*, 93 N. C., 612; *State* v. *Jackson*, 112 N. C., 850.

If the defendant had proper ground for a *certiorari* he should have moved for it before the cause was reached for argument. *State* v. *Rhodes*, 112 N. C., 857. He will not be allowed to obtain a delay of six months by his own laches in this regard.

It is not improper to say that looking into the record there appears to have been no error, even if the case had been here regularly. Appeal Dismissed.

STATE v. JOHN E. GILLIKIN.

Prosecution for Failure to Work on Public Road—Defence—Amendment of Magistrate's Warrant in Superior Court—Special Verdict.

1. The fact that a defendant, in a prosecution for failure to work the public road, had no occasion to use the road to which he was assigned to duty is no defence.
2. The assignment of one liable to road duty to any particular road rests with the Board of Supervisors of the township.
3. A special verdict in which, after setting out the facts, the jury say: "If upon these facts the Court be of the opinion that the defendant is guilty, the jury so find, otherwise not guilty," is sufficient as following approved precedents.

The defendant was convicted in Magistrate's Court for failure to work on public road, the warrant charging that he willfully and unlawfully failed and refused "to attend and work on the road leading from Adams' creek to South river, he having been lawfully summoned to work thereon, and he, the said John E. Gillikin, being at the time of such failure and refusal one of the hands assigned to work on said road." Defendant appealed to the Superior Court, and when the case was called for trial the Solicitor was, upon motion, allowed to answer the warrant by alleging that the defendant had been duly assigned to work on the road known as the turnpike in said county; that he failed to pay one dollar to send an able-bodied hand in his place, and that he was liable to work on said road, and that J. B. Neal was the overseer thereon. The jury returned a special verdict as follows:

"That the defendant, John E. Gillikin, had been duly assigned to work on the road leading from the turnpike road in said county to South river (three and one-half miles), and was within the age and boundary lines to work on said road, and the boundaries of residents liable to work designated; that after being duly summoned to work on said road by J. B. Neal, the overseer of said road, he failed to pay one dollar or to send an able-bodied hand, and unlawfully failed and refused to attend and work thereon; that it is seven or eight miles from the defendant's house to the nearest point on the said road, and no road leads from his house to said road, not even a cow path; he would have to cross Big creek, one-half mile wide, where there is no ferry; that he lives 200 yards from South river, has no outlet from his house by land, and uses a private road called Shoo Fly to the turnpike. This route to the road he is required to work is seven or eight miles; that he uses the turnpike to market, and does not use at all the road he is required to work; that the people in this part of the county use boats more than vehicles on land; that from his house to the nearest point of the road by direct route on land is about five and a half miles—by water four and a half miles. He uses a boat in traveling from place to place, and the people generally do so in that section; that he can go on South river in boat to a place near the terminus of the road, and there is a cart path to the road from the river; that he has no boat, but uses a borrowed boat: that other hands go by water; that the road is of no use to defendant or people in his neighborhood; that he is not a hand on any other road; that the road could not be kept up if the work was confined to those who live immediately on it, as only three hands live immediately on it. The people live from one to three miles on the road, and about one dozen hands live within three miles of the road who are liable to road duty.

"If upon these facts the Court be of opinion that the defendant is guilty, the jury so find; otherwise not guilty."

The Court, being of opinion that the defendant was guilty, rendered judgment accordingly, and defendant appealed.

The Attorney General, for the State.

Messrs. Simmons, Gibbs & Pearsall and *T. B. Womack*, for defendant (appellant).

CLARK, J.: The special verdict finds that all the requirements existed which rendered the defendant liable to road duty, and the Court had power to amend the warrant as it did. *State* v. *Poole*, 106 N. C., 698. The defendant failed to render such duty when duly summoned, and was properly adjudged to be guilty. The fact that defendant did not use and had no occasion to use the road to which he was assigned is no defence. His assignment to any particular road rested with the Board of Supervisors of the township. *The Code*, §2016. There is nothing tending to show that such Board acted fraudulently, oppressively or beyond their powers. As to the point raised upon the form of the special verdict, there is some discrepancy between the earlier practice as stated in *State* v. *Moore*, 29 N. C., 228, and a later practice sanctioned in *State* v. *Moore*, 107 N. C., 770, and cases there cited. This was brought to the attention of the Court in *State* v. *Ewing*, 108 N. C., 755, and after "mature consideration" it was there held that either practice would be sufficient, but that the older practice as stated in *State* v. *Moore*, 29 N. C., 228, was the better one. That is the course which has been followed in the present instance. No Error.

STATE v. ALLEN CAGLE.

Bastardy Proceedings — Presumptive Evidence — Instructions to Jury — Impeachment of Witness — Trial of Criminal Actions.

1. In the trial of a defendant charged with bastardy an instruction by the Court that the affidavit of the woman that the defendant was the father of the child was presumptive evidence against the defendant was proper and followed the statute, section 32 of *The Code*.
2. In the trial of an action the trial Judge may hand his instructions, in writing, to the jury, and it is not error, after they have retired and requested him to do so, to send a written memorandum of certain dates necessary to be remembered in order to enable them to reach a conclusion.
3. In the trial of bastardy proceedings a witness for the State, in reply to a question on cross-examination, said, "I do not keep a bawdy-house": *Held*, that such answer was conclusive, and could not be contradicted by hearsay evidence as to the bad character of the witness.
4. Bastardy proceedings, being under section 35 of *The Code* (as held in *State* v. *Burton*, 113 N. C., 655, and *Myers* v. *Stafford*, 114 N. C., 234) a criminal action in respect to the fine directed to be imposed, properly stand for trial on a day set apart for the trial of criminal actions only.

This was a BASTARDY PROCEEDING, tried before *Battle, J.*, and a jury, at December Term, 1893, of MOORE Superior Court on appeal from a Justice's Court.

Witnesses were introduced and testified in behalf of both sides. At the conclusion of the testimony the Court told the jury, that on the whole case, the burden of proof on the issue submitted, whether the defendant was the father of the child, was upon the State, but the affidavit of the woman having been introduced, that is presumptive evidence against the defendant, subject to be rebutted by other testimony which may be introduced by him; that a proceeding in bastardy is not a criminal action; that it was not necessary for the State to prove the paternity beyond a reasonable doubt, nor, after the introduction of the affidavit, was it necessary for the defendant to prove beyond a reasonable doubt that he was not the father of the child, but this must be shown to the satisfaction of the jury, and if it was not so shown they should answer the issue, Yes; and that if the oral testimony, offered by the prosecution and the defendant, taken all together, left the minds of the jury in doubt, if their minds were brought to an equipose, and neither side preponderated, then the presumption raised by the written examination of the woman would not be rebutted, and the issue should be answered, Yes; but that if the defendant had satisfied the jury that he did not beget the child, or if, in their opinion, there was, on the oral testimony, a preponderance of evidence in defendant's favor, then the issue should be answered, No.

To the above instructions, touching the burden of proof, the defendant excepted.

Second Exception.—The Judge went over to the jury all the arguments advanced by defendant's counsel; that prosecutrix was of bad character, and was telling a palpable falsehood when she said that the defendant had had intercourse with her only once; that he was the first man she had ever known, and yet she had previously had a bastard, etc.; that it was very improbable that the defendant, if he were a frequent visitor at her father's house, should have had connection with her once and only once, etc.; that defendant was of good character and the more credible, etc.; said counsel had argued to the jury that the prosecutrix had said on the trial before the Justice of the Peace that the child was begotten in July or August, 1889, and that there was a discrepancy between that statement and the contents of the affidavit or written examination of the woman—the counsel dwelling on this at considerable length. The Judge told the jury that, according to his calculation, the interval between July or August, 1889, and the date of the affidavit, January, 1893, was three years and five or six months; that she had stated (as the counsel for the defendant himself said) that the child was two years and eight months old at the time the affidavit was made, and that to this last period, if the time of gestation be added, there would be three years and five months; that the jury would make their own calculation, and if there was a discrepancy it would tend to contradict the prosecutrix and be in favor of the defendant; if there was no discrepancy it would tend to corroborate the prosecutrix.

After the jury had retired they sent the Sheriff to the Judge with the request that he jot down those dates for them, and the Judge wrote down on a sheet of paper the following, one of the defendant's counsel looking on:

"1. Prosecutrix says the child was begotten in July or August, 1889.

"2. The affidavit is dated in January, 1893.

"3. She says the child was two years and eight months old at the time the affidavit was made."

The said counsel said to the Judge that he did not object to the two last *memoranda* being sent to the jury, but did object to the first one being sent them. The Judge, remarking to the attorney that his argument on this point was based on the fact that the prosecutrix had said the child was begotten in July or August, 1889, told the Sheriff to take the paper to the jury, the paper with all three *memoranda* on it, which he did.

To this the defendant excepted.

Third Exception.—In charging the jury the Court told them the issue was whether the defendant was the father of the bastard—not whether this Thomas McNeill kept a bawdy-house—and said McNeill's answer to the question about the bawdy-house was conclusive as to that matter, by which it was sought to impeach him. At the time this was stated to the jury the defendant did not enter any objections. The defendant did except after verdict and filed written exceptions, and in his case on appeal, a verdict having been returned against the defendant, he moved for a new trial on account of the alleged errors above assigned. Motion overruled, and defendant excepted.

Fourth Exception.—This case was tried on Monday, the first day of the term, but no objection to that was made by the defendant till after the verdict had been rendered. He then moved to set aside the verdict on that account, the statute (Acts 1891, ch. 277) providing that the first three days of this term shall be devoted to the trial of criminal actions only. The Court held that this objection, not being taken until after verdict, was waived, and the motion was overruled. The defendant excepted. For the same reason the defendant moved in arrest of judgment. Motion denied, and defendant excepted. For the same reason defendant moved to dismiss the action for want of jurisdiction. Motion denied, and defendant excepted.

Judgment against defendant, from which he appealed.

The Attorney General, for the State.
Mr. W. C. Douglass, for defendant (appellant).

MACRAE, J.: His Honor followed the statute (*The Code*, §32) when he instructed the jury that the affidavit of the woman was presumptive evidence against the defendant. If presumptive it might be rebutted by testimony; if not rebutted the preponderance upon the issue of paternity was on the side of the State, and there could be no even balance. *State* v. *Williams*, 109 N. C., 846; *State* v. *Rogers*, 79 N. C., 609.

The second exception cannot be sustained. The Judge may now by statute hand his charge in writing to the jury; surely he may at their request send them a memorandum of certain dates necessary to be remembered in order to enable them to reach a conclusion. Only one item of this memorandum was objected to by defendant's counsel, and this item was necessary to enable the jury to understand the others.

The third exception was taken in apt time, but is not sustained. The witness Thomas McNeill, the father of the prosecutrix, was testifying for the State, and, in reply to a question upon his cross-examination, said: "I do not keep a bawdy-house." The defendant afterwards offered a witness who testified that the character of Thomas McNeill was not good, and the Solicitor asked him on cross-examination, "What is it bad for?" The reply was, "It is bad for keeping a bawdy-house." If McNeill's testimony on this point could have been contradicted it must have been by direct testimony and not by hearsay evidence as to his character. The question was for no other purpose than to impeach his whole testimony. The answer was a direct and positive denial, and was conclusive unless contradicted by testimony other than that as to character.

The last exception has been disposed of by the ruling of this Court in *State* v. *Burton*, 113 N. C., 655, and *Myers* v. *Stafford*, at this Term, where it was said in substance that a bastardy proceeding is an anomalous one since the Act of 1879, being civil in so far as it seeks to hold the defendant liable for the support of the child, but that by virtue of said act, section 35 of *The Code*, it is criminal in its nature as regards the fine directed to be imposed.

It properly stood for trial on the day when it was tried.

No Error.

STATE v. M. L. BARRINGER.

Affray—Use of Deadly Weapon—Justification—Burden of Proof.

Where, on trial for an affray, the defendant admitted that he used a deadly weapon, the question of reasonable doubt as to his guilt was eliminated and the burden of showing matter of mitigation, excuse or justification to the satisfaction of the jury was thrown upon the prisoner.

INDICTMENT for an affray, tried before *Whitaker, J.*, and a jury, at Fall Term, 1893, of ROWAN Superior Court.

The defendant Barringer and another were convicted, and from the judgment on the verdict the defendant Barringer appealed.

The Attorney General, for the State.

No counsel *contra*.

BURWELL, J.: The appellant, with two others, was indicted for an affray. He offered himself as a witness in his own behalf and "admitted that he struck with and used the deadly weapon as charged in the bill." His Honor instructed the jury that "the defendant having admitted on the stand that he struck with the deadly weapon as charged, the question of reasonable doubt was eliminated as to Barringer and the burden of proof shifted to the defendant, and that it was his duty to satisfy the jury that he struck in self-defence, and failing to satisfy the jury that he used the weapon in self-defence they would convict." To this the defendant excepted.

In the case of *State* v. *Willis*, 63 N. C., 26, it is said that upon a trial for murder the fact of killing with deadly weapon being admitted or proved, the burden of showing any matter of mitigation, excuse or justification, is thrown upon the prisoner, and in such case it is incumbent on him to establish such matter to the satisfaction of the jury. Such being the well-established rule in this State when the assault with the deadly weapon resulted in the death of the assailed, we can see no reason for refusing to apply it in cases where the assault did not cause death. The same reason that will support the rule in the one case will support it in the other. The indictment against the prisoner was fully sustained by proof, by means of his own admission that he had fought as charged with a deadly weapon. He must then excuse himself. How? By proof of facts that will justify his conduct, which, until excuse is proved, appears to be clearly unlawful. He must prove these facts not merely by preponderance of the evidence, but to the satisfaction of the jury. Such is the rule here (*State* v. *Payne*, 86 N. C., 609; *State* v. *Ellick*, 2 Wins., 56; *State* v. *Potts*, 100 N. C., 457), and for that purpose he may avail himself of the State's evidence as well as that introduced by himself. The judgment must be Affirmed.

STATE v. I. H. FOUST.

Embezzlement—Misappropriation of Funds—Instructions to Jury.

1. To "embezzle" means not only to "appropriate to one's own use," but also to "misappropriate fraudulently"; therefore,
2. Where an indictment charged that defendant "did convert to his own use and embezzle" a check, an instruction that defendant was guilty if he received the check and misappropriated it fraudulently, whether for his own benefit or not, was proper.

INDICTMENT for embezzlement under section 1014 of *The Code*, tried before *Battle, J.*, at February Term, 1894, of ROWAN Superior Court.

The facts appear in the opinion of Associate Justice CLARK. The defendant was convicted, and appealed.

The Attorney General, for the State.

Messrs. Charles Price and *Lee S. Overman*, for defendant (appellant).

CLARK, J.: The defendant was treasurer of the Vance Cotton Mills and also Cashier of the First National Bank of Salisbury. He received the check of $922.63, set out in the indictment, as treasurer of the Vance Cotton Mills, and, without giving that company any credit for it, he placed it in a bank in Charlotte to the credit of the First National Bank of Salisbury. There was evidence from his confessions and otherwise tending to show that he did this to cover up his shortage as cashier of said bank.

The defendant assigns as error:

1. The refusal of the Court to charge the jury as set out in defendant's prayers for instructions.

2. The instructions to the jury that it made no difference whether the defendant converted the check to his own use or not, he would be guilty if he received the check and misapplied it fraudulently.

3. That, as there was no controversy about the facts in the case, it was the duty of the Court to say upon those facts that the defendant was not guilty.

The first assignment of error is covered by the second and third. The third assignment of error depends upon the second. We are left face to face with the second assignment only.

The contention of the defendant is, therefore, that if he received the check and misapplied it fraudulently he would not be guilty under the first count (the second count having been *nol. prossed*), which charges that the defendant "willfully, fraudulently, knowingly and feloniously did convert to his own use and embezzle" the said bill of exchange. On the contrary, we think the Court correctly "told the jury that to embezzle was for an agent fraudulently to misapply the property of his principal; that it was not necessary that the agent should convert it to his own use; that is, expend the money for his own benefit." The defendant received the check as the property of the Vance Cotton Mills and by virtue of the trust reposed in him as its treasurer. If he fraudulently misapplied the check, giving another corporation the proceeds, such misapplication of the check, when fraudulently done, is "to embezzle" within the just and true meaning of the statute and the indictment. To embezzle may mean to "appropriate to one's own use," but it embraces also the meaning "to misappropriate." Indeed, "to misappropriate" is given as a synonym of "to embezzle" in Soule's Synonyms and as one of the definitions in probably all the dictionaries. *The Code*, §1014, renders it indictable to embezzle or fraudulently convert to one's own use. This shows that these acts are not necessarily and strictly synonymous. The defendant received the check as the property of one company and applied it to the credit not of that company but of another. The jury were properly told that such misappropriation or misapplication, if done fraudulently, was embezzlement, which, in fact, is simply a fraudulent breach of trust by misapplying the property entrusted to him to the use either of himself or another when done with a fraudulent intent.

After a careful consideration of the earnest and ingenious argument of appellant's counsel we can perceive no prejudice that the defendant has suffered in the trial below.

No Error.

STATE v. MAGGIE LEE et al.

Indictment, sufficiency of—Second Indictment at Same Term—Counts—Verdict—Practice.

1. Where, after verdict and judgment, the Court set the same aside and granted a new trial, it was allowable to put the defendants upon trial on a new indictment found at the same term, upon the same testimony of the same witnesses, the two bills being treated as several counts in the same indictment.
2. Where, upon an indictment containing two counts, one of which is good, there is a general verdict of guilty, the verdict will be presumed to be on the valid count and will support the judgment.
3. Where a verdict of guilty was set aside in the discretion of the Judge and a new trial was heard upon another bill, there was nothing to support a plea of former conviction, for if the first indictment was defective so as to warrant arrest of judgment the defendants cannot be considered as having been in jeopardy.
4. Where an indictment is of doubtful validity it is proper practice to send a second bill at the same term at which the first stood for trial.

INDICTMENT under section 985, subsection 7 of *The Code*, for an attempt to burn a dwelling-house, tried before *Winston, J.*, at December Term, 1893, of FORSYTH Superior Court.

The defendants were convicted, and appealed.

The facts appear in the opinion of Associate Justice CLARK.

The Attorney General, for the State.

Mr. J. S. Grogan, for defendants (appellants).

CLARK, J.: After verdict and judgment the defendants moved in arrest of judgment. The Court, as a matter of discretion, set aside the verdict and sentence, granting a new trial. A new bill was found at the same term upon testimony of same witnesses, stating the same charge more explictly. The defendants were again put to trial, treating the two bills as several counts in the same indictment. This was admissible. *State* v. *Johnson*, 50 N. C., 221; *State* v. *Brown*, 95 N. C., 685; *State* v. *McNeill*, 93 N. C., 552. As the second count is unquestionably good it is immaterial to consider whether the first count was good or not. There having been a general verdict of guilty on two counts, the law will place the verdict upon the good count. *State* v. *Edwards*, 113 N. C., 653; *State* v. *Toole*, 106 N. C., 736. The reason of this is that a general verdict on two counts is in effect two verdicts of guilty, one as to each count, and the verdict on the valid count supports the judgment. The defendants, if they had so chosen, might have had the jury to respond severally to each count. *State* v. *Basserman*, 54 Conn., 88; *State* v. *Toole, supra*, and cases there cited.

As to the plea of former conviction, the former verdict was against the defendants, and having been set aside in the discretion of the Court, nothing remains to support the plea of a former conviction. If the first count was defective, so that judgment should have been arrested, the defendants have not been in former jeopardy. *State* v. *England,* 78 N. C., 552.

It was perfectly proper to send a second bill at the same term. *State* v. *Harris,* 91 N. C., 656. Indeed, this Court has recommended if a bill is of doubtful validity to send a second bill at the same term and not to postpone trial thereon, as a matter of course, till another term. *State* v. *Skidmore,* 109 N. C., 797; *State* v. *Flowers, Ibid.,* 841, 845. Justice should be administered promptly and without unnecessary cost to the public, to the defendant or the witnesses. *State* v. *Caldwell,* 112 N. C., 854.

No Error.

STATE v. F. R. JOHNSON.

Municipal Authority—Fire District—Wooden Buildings—Ordinance Prohibiting Repairs of Wooden Buildings.

1. Municipal corporations may, if there is no law to the contrary, prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe; and, it seems, this may be done by or through the delegated authority of the Legislature, even where the enforcement of the law or ordinance causes a suspension of work previously contracted for.

2. Where the Legislature has granted authority to a municipality to supervise or prevent the replacing of a roof with another of shingles, instead of constructing one of material less liable to destruction, an ordinance forbidding an owner of a building within a prescribed fire limit to alter or repair a wooden building within such limit, without the consent of the Board of Aldermen, is not unreasonable, and will be upheld.

CRIMINAL ACTION, tried before *Boykin, J.*, at Spring Term, 1893, of FORSYTH Superior Court, on appeal from the judgment of the Mayor of the city of Winston.

A jury trial was waived, and the facts agreed are as follows: Defendant was occupying and controlling a two-story wooden frame house with brick basement, situated in the city of Winston, within 1,000 feet of the Court Square, and about the 9th of December, 1892, the house was partially destroyed by fire; that on the 6th of January, 1893, the defendant made a contract with certain builders to have the house repaired at the cost of $490; the original cost of the building, including brick basement, was about $2,000. Shortly after work began under said contract the defendant was arrested, tried and convicted before the Mayor, and on appeal to the Superior Court the case was dismissed on motion to quash the warrant. About the 17th of March, 1893, the defendant, without the consent of the Board of Aldermen, placed said contractors at work again on the building, and he was again arrested and tried before the Mayor and fined, and he appealed from the judgment to the Superior Court. The following ordinances relating to this matter were adopted by said Board: "That for the protection of the city against fire the following ordinances be enacted under chapter 5, as sections 36 and 37 of said chapter 5 of the ordinances of the city: Section 36. That the fire limit shall be the territory from the center of Court Square, extending one thousand feet in each direction; that it shall be unlawful without the consent of the Board for any person or corporation to erect, alter or repair any wooden building within said fire limit, and any person or corporation violating the same shall be fined fifty dollars; that for each day such person or corporation continues to erect, alter or repair such building it shall constitute a separate violation of the ordinance, etc. Sec. 37. That any person who shall assist in constructing or repairing any building prohibited in above section shall be fined," etc.

There were other sections of the ordinances prohibiting the erection of wooden buildings in the business portion of the city without the written consent of the aldermen, etc., and the fire limit, 1,000 feet from the Court Square, was established, etc.

The defendant appealed from the judgment.

The Attorney General and *Messrs. Glenn & Manly*, for the State.

Messrs. Watson & Buxton, for the defendant.

AVERY, J.: Municipal corporations are the creatures of the Legislature, and their powers may be curtailed, enlarged or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no statute will be enforced which impairs the obligation of a contract, interferes with vested rights, or is in conflict with any provision of the organic law of the State or nation. It is too well settled to recapitulate, or even justify discussion, that towns certainly by virtue of an express grant of authority to do so, and according to most authorities by implication arising out of the general welfare clause, if there is no general law to the contrary, are empowered to prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may by ordinance prescribe. 15 Am. and Eng. Enc., 1170; 1 Dillon Mun. Corp., section 405; Horr & Bemis Mun. Ord., section 222; *Keilinger* v. *Bickel*, 117 Pa. St., 326. The weight of authority seems to be also in favor of the proposition that the Legislature has the power to prevent the erection of wooden buildings in such corporations, or to delegate to the municipalities the authority to do so, even where the enforcement of the law or ordinance causes a suspension of work in the erection of structures of this kind by persons who are carrying out contracts for their erection made previously with the owners of the land. *Cordon* v. *Miller*, 11 Mich., 581; *Ex-parte Fiske*, 17 Cal., 125. Persons, in contemplation of law, contract with reference to the existence and possible exercise of this authority when it is vested in the municipality. *Salem* v. *Magness*, 123 Mass., 574; *Munn* v. *Illinois*, 94 U. S., 113; *Woodlawn Cemetery* v. *Everett*, 118 Mass., 354; *Commissioners* v. *Intoxicating Liquors*, 115 Mass., 153. Upon this same principle all agreements for building are deemed to be entered into in view of the contingency that such power may be granted by the Legislature (when it has not already been delegated) while the contract is still *in fieri*. 15 Am. and Eng. Enc., 1171.

While it might be unreasonable to prohibit even the slightest repairs to wooden buildings standing within the fire limits prior to the passage of a statute or ordinance establishing such limits, the power to prevent repairs is delegated and presumably exercised for the protection of property, and where a wooden structure within the bounds is partially destroyed by fire already it is not unreasonable to require a new roof to be made of material less liable to combustion, or to forbid the repairs altogether when the damage to the building is serious, and to that end to compel the owners to give notice to the town authorities of their purpose to repair, and of the character of the contemplated work. *Village of Lewisville* v. *Webster*, 108 Ill., 414.

We are aware that there is much conflict of authority as to the reasonableness of ordinances forbidding all repairs or the enforcement of them so as to prevent replacing roofs with the same material used before their destruction. Horr & Bemis, section 223 (214); *Brady* v. *Insurance Co.*, 11 Mich., 425; *Ex-parte Fiske, supra.* But in this particular instance the Legislature has granted a municipality the power to supervise or prevent the replacing of the roof with another of shingles instead of constructing one of material less liable to destruction, and we are not prepared to question its authority to do so, since, upon the principle already announced, persons contracting with reference to the chances of the granting as well as the exercise of such powers acquire no vested rights, and afterwards voluntarily incurring all of the risks incident to their situation, have no reason to complain of the loss when it befalls them.

The Court imposed a fine of fifty dollars. There was no attempt to enforce the portion of the ordinance imposing a penalty of ten dollars for every hour the building was permitted to remain. There may be more doubt as to the reasonableness of that provision. *Commissioners* v. *Wilkins*, 121 Mass., 356. But it is not necessary to pass upon a question not fairly raised, and we forbear to do so. The judgment is Affirmed.

STATE v. R. L. DIXON.

Carrying Concealed Weapons—Intent.

1. The offence of carrying a concealed weapon consists in the guilty intent to carry the weapon concealed, and does not depend upon the intent to use it; therefore,
2. Where, in the trial of one charged with carrying concealed weapons, he testified that he carried it for the purpose of selling it, the trial Judge properly instructed the jury, in effect, that there was no evidence to go to the jury to rebut the presumption of guilt which the statute raised from the possession, about his person and off his own premises, of a concealed deadly weapon.

(*State* v. *Harrison*, 93 N. C., 605, overruled).

This was an INDICTMENT for carrying a concealed weapon (a pistol), tried before *Winston, J.*, at November Term, 1893, of ROCKINGHAM Superior Court.

Witnesses for the State testified that they saw the defendant off his own premises with a pistol concealed about his person; that this was at a mill-pond.

The defendant testified in his own behalf that one Cornelius Williams gave him the pistol to sell, promising him that he might have all he sold it for above a certain amount, and in this he was corroborated by Williams. He further testified that he carried the pistol to the pond that day, it being a holiday, and hearing there was to be a picnic, for the purpose of trying to sell it to some one of the crowd; that this was his sole purpose in carrying it, and that it was for no purpose offensive or defensive. He further testified that there was no special person to whom he had any engagement to sell the pistol at the pond; that he and others shot at a mark that day; that on one occasion before this he had tried to sell it to a "hand" in a field; that he had never sold the pistol, but since the time at the mill-pond had had it at home; that on his way home from the mill-pond on the day above-mentioned he went by a neighbor's house, having the pistol with him, after carrying it to the pond to sell, and being on his way home, as above stated.

His Honor charged the jury that a man might rebut the presumption of guilt arising in cases of this kind, after admitting that he had a pistol concealed, by showing that he was carrying the pistol for a lawful present purpose, but that if one could borrow or procure a pistol to sell and carry it about with him from place to place during a period of several months, trying to sell it, and selecting public days for the purpose as well, and shooting same five times on a picnic occasion, the statute would be a dead letter;

that upon the whole evidence, if believed, the defendant was guilty.

There was a verdict of guilty, and the defendant, having excepted, appealed from the judgment pronounced.

The Attorney General, for the State.
Mr. A. J. Burton, for defendant.

CLARK, J.: The defendant carried the pistol concealed about his person off his own premises. The criminal intent in such cases is the intent to carry the weapon concealed. The matter set up in defence is not sufficient, and upon the defendant's own testimony he was guilty. As there seems a misconception to some extent of the authorities it may be well to review them:

In *State* v. *Speller*, 86 N. C., 697, the act forbidding the carrying of concealed weapons was held constitutional; and it was further held that the party would be guilty of violating the act though he carried the weapon for self-protection in consequence of threats of violence.

In *State* v. *Woodfin*, 87 N. C., 526, it was held no defence to show that the concealed weapon was carried for the purpose of hunting.

In *State* v. *Gilbert*, 87 N. C., 527, it was held that the presumption of guilty intent from the fact of the weapon being concealed was rebutted by the express finding of the jury, in the special verdict, that there was no guilty intent. There, a merchant had bought a pistol in his trade and was carrying it from one store to another. "Thoughtlessly," as the Court says, he put it in his pocket without intending to conceal it. The guilty intent, it is there said, is "the purpose to carry it so it may not be seen," and that purpose the jury found did not exist in that case. This decision has been much misunderstood.

In *State* v. *Broadnax*, 91 N. C., 543, it was held that one was not guilty who was merely carrying to the owner a pistol for which he had been sent, since the offence was the wearing or carrying of a concealed weapon which the bearer might use on an emergency. This purports to be based upon Gilbert's case, *supra*, but in fact was an extension of the principle of that case carried to its extreme limit. It can only be sustained on the ground that the party was not intending to carry a weapon at all, but was simply conveying a piece of merchandise, as an express messenger might carry a pistol or rifle in a box or case in the line of business.

In *State* v. *Harrison*, 93 N. C., 605, it was held that if the defendant carried the weapon concealed on his person, but testified that he did so for the purpose of trading it off, this was evidence to rebut the intent, and should have been submitted to the jury. After the fullest consideration, and with deference to the eminent Judge who delivered the opinion, we cannot think so, nor do we concur in the reason given that it was "on all-fours" with Gilbert's case. In Gilbert's case the jury found that there was no criminal intent; *i. e.*, no intent to carry the weapon concealed, it being a sample pistol thoughtlessly put in the pocket of the overcoat by the merchant purchaser and carried from one store to another to be packed up with other purchases. In Harrison's case the defendant purposely and intentionally carried the weapon concealed. There was full opportunity to use it if occasion offered, and the defendant's act came within the spirit and letter of the statute. There was no reason why the pistol could not have been carried openly, as the defendant could have legally carried it. This would have given better opportunities of negotiating a sale than the concealed carriage of it.

Having said this much, it is unnecessary to say more than that his Honor correctly charged the jury in the present case "that if one could borrow or procure a pistol to sell or convey it about with him from place to place, during a period of several months, trying to sell it and selecting public days for the purpose as well, and shooting some five times on a picnic occasion, the statute would be a dead letter; that upon the whole evidence, if believed, the defendant was guilty." This was in effect a charge that there was no evidence sufficient to go to the jury to rebut the presumption of guilt which the statute raises from the possession about his person of a deadly weapon off one's own premises. *State* v. *McManus*, 89 N. C., 555. The carrying a concealed weapon cannot be excused because carried in self-defence or for hunting. Of course, therefore, it cannot be excused if carried for the purpose of peddling it off, with all the incidental opportunities of use. To so hold would be a virtual and effective repeal of the statute. The presumption may be rebutted by an express finding that there was no guilty intent, as where the pistol was carried from one store to another to be packed up, without any thought or intent to conceal it, or where, under some circumstances, it is carried by a messenger to be delivered to the owner or purchaser. But matters of excuse can be extended no further with safety and a due regard to the integrity of the statute. As was said in McManus' case, *supra*, the statute "must receive such reasonable construction as will effectuate its purpose."

State v. *Harrison*, *supra*, is overruled. In trials for this offence it should be borne in mind that the guilty intent is the intent to carry the weapon concealed, and does not depend upon the intent to use it. The object of this statute is not to forbid the carrying of a deadly weapon for use, but to prevent the opportunity and temptation to use it arising from its concealment. If the weapon is carried for lawful use, or even for unlawful use, the defendant would not be guilty under this section if the weapon is carried openly, since this statute applies not to the act of carrying the weapon or the purpose in carrying it, but to the manner of carrying it. No Error.

STATE v. MACK AUSTIN.

Ordinance, validity of—Municipal Authority—Police Power—Restraint upon Minors.

1. The Legislature may declare it unlawful for any minor to enter a bar-room.
2. The Legislature may transfer to municipal bodies created by it the duty and responsibility of exercising a portion of its own police power in such manner as the commissioners may deem necessary.
3. Where the charter of a town authorizes the commissioners "to make such by-laws, rules and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land," an ordinance prohibiting an unmarried minor, except when acting as the agent of his parent or guardian, from entering any bar-room or room where spirituous, vinous or malt liquors are kept for sale, is valid, being reasonable and consistent with the laws of the State.

AVERY, J., dissents, *arguendo.*

CRIMINAL ACTION, tried at August Term, 1893, of UNION Superior Court, on appeal from a judgment of the Mayor of the town of Monroe.

The defendant was charged with the violation of an ordinance of the town. Upon the trial in the Superior Court the jury found a special verdict, substantially as follows: "Ordinance No. 62 is that no person who is under twenty-one years of age shall enter any bar-room, etc., provided the same shall not apply to any minor who is married or who enters as the agent or servant of the parent or guardian; the defendant was twenty years old and not married and was not acting as agent or servant when he entered the bar-room."

The defendant requested the Court to charge that the ordinance was invalid. This was refused, and the defendant was held to be guilty, and appealed.

The Attorney General, for the State.

Messrs. Batchelor & Devereux and *R. B. Redwine*, for defendant.

BURWELL, J.: The town of Monroe has power and authority "to make such by-laws, rules and regulations for the better government of the town" as the commissioners thereof may deem necessary, provided the same are "not inconsistent with the laws of the land." *The Code*, §3799.

This is an express grant of authority to the officers of this municipal corporation to exercise within the territory made subject to their control the police power of the State, the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with "the laws of the land."

Authorities need not be cited to prove that the Legislature of the State may transfer to local municipal legislative bodies created by it the duty and responsibility of exercising a portion of its own police power. It seems to be conceded that the Legislature has power to declare it unlawful for any minor to enter a bar-room, and thus protect them from the evil influences that might affect them if exposed to the temptations to which their presence in such resorts might expose them.

This concession is an admission that the ordinance in question is not repugnant in its provisions to either the Federal or State Constitutions, for those fundamental enactments impose their restraining influence on the Legislature not less than on its creatures—the legislative councils of the towns and cities of the Commonwealth.

There being, then, no ground for maintaining that the ordinance under consideration is invalid because of its unconstitutionality, and the grant by the Legislature to the municipality of the power to exercise its police power in such manner as the commissioners may deem necessary being clear and explicit, it only remains to inquire whether the enactment is consistent with the laws of the State and is reasonable. In the grant of police power to this municipality the restriction imposed is that its ordinance shall not be inconsistent with "the laws of the land." The expression, "the laws of the land," can only refer to the laws of this State—the statutes and common law—by the enforcement of which peace and good order are maintained throughout this State, and by which the conduct of all its citizens, whether they dwell in the cities and towns or not, is controlled. It is not permitted to these local legislative bodies in this State to exercise that portion of the police power entrusted to them upon subjects about which the Legislature has seen fit to enact laws (*Washington* v. *Hammond*, 76 N. C., 33; *State* v. *Brittain*, 89 N. C., 574), nor to adopt ordinances that tend to obstruct the general policy of the State in the exercise of its police power as evinced by its statutes. In the treatise of Horr & Bemis on Municipal Police Ordinances (section 88) it is said: "According to the American theory of municipal existence, the legislation permitted to be exercised by municipal corporations is a mere delegation of the power of the State, and the ordinances created by virtue of this delegated authority are as much a part of the general scheme of legislation as are the laws of the State. It is, therefore, necessary that they should be consistent with the laws of the State. * * * Municipalities have no power to repeal, directly or indirectly, the laws of the State, and their legislation must accord with the policy of the legislation of the State. If the only measure of authority were the terms of the charter there would often be ordinances plainly within the granted power but irreconcilable with some State law or contrary to the settled policy of the State, a result neither lawful nor intended. Some charters, by express language, restrict the ordinances that may be passed to such as are consistent with the laws of the State. Others are silent upon the subject, but the restriction exists whether expressed or not, and becomes very important in its application."

We can discern no inconsistency between the provisions of the ordinance under consideration and any particular law of the State or the general policy of its legislation. Indeed, we find in it rather a commendable effort on the part of this local legislative body to supplement what the State by its general legislation has done to protect the young of the Commonwealth. The State declares that one who deals in intoxicating liquors shall neither sell nor give to an unmarried minor any such liquors. *The Code*, §1077. This ordinance declares that such minor shall not enter the bar-rooms that are subject to the control of the town. It helps and does not hinder the policy of the State upon this subject. All its tendencies are towards the prevention of the infraction of the law of the State and the preservation of peace and good order. Its rigid enforcement must be desired by the proprietors of saloons, for only danger and trouble can come to them from allowing such persons to frequent their places of business. *State* v. *Kittelle*, 110 N. C., 560. It interferes with none of the saloon-keeper's rights, and is, indeed, contrived in part for his protection.

It prevents minors from exposure to temptation in places where they should not go. The law which forbids any dealer in intoxicating liquors to give or sell to a minor such liquors is valid. Its validity could scarcely be assailed with any show of reason. Black on Intoxicating Liquors, section 42. This ordinance rests upon the same foundation as that law — the right of the State, either by direct general legislation or through its municipal "home rule" agencies, to shield youth from temptation. It has been held (says the author quoted above) that a law against permitting a minor to enter upon and remain in a retail liquor dealer's place of business is valid, and the State has power to enact and enforce such a law even in disregard of the parent's wishes when its object and tendency are to protect the child. *Goldsticher* v. *Ford*, 62 Tex., 385.

What has been said above seems a sufficient refutation of the assertion that the ordinance is unreasonable, oppressive and discriminating. It seems to us a wise and wholesome restraint upon the youth of the community, made in their interest as well as that of the law-abiding keepers of the bar-rooms. It is not oppressive.

The police of our cities and towns—officers charged with the duty of preventing offences as well as of arresting offenders—should have the power and authority to prevent youths from entering saloons. They can derive such authority only from such ordinances. It is not unlawfully discriminating. It applies to all unmarried minors, and is no more obnoxious to this objection than is the section of *The Code* mentioned above and other laws which are made to protect and control the youth of the land. While it is true that all grants of power to municipal corporations should be strictly construed, and that all doubts should be resolved against the authority of the corporation, it is also true that where, as in this case, the grant of power is plain and unequivocal, Courts will not interfere with, control or nullify the acts of the officers of the municipality except for most cogent reasons. The contrary course would bring about an unseemly intermeddling of the judicial department of the government with the established agencies of the legislative department—the legislative councils of towns and cities—and such intermeddling could but have the effect of hampering the action of those bodies and retarding the development of such communities.

If fraud, dishonesty or oppression is charged against them Courts will be swift to investigate the charge and to correct the evil if found to exist. But other matters, involving mere questions of expediency and judgment, must be decided in another way. We adopt, as applicable here, the language used by Judge DANIEL in *Hellen* v. *Noe*, 3 Ired., 493: "If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is against the general law or is, in itself, unreasonable."

No Error.

AVERY, J., dissenting: I cannot concur in the opinion of the Court, and as my dissent rests upon the idea that the municipality has usurped powers not delegated to it, I deem it proper to give expression to my views.

The only question presented is whether a municipal corporation under a grant of power (1) to make such by-laws, rules and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land; (2) to exercise all of the authority conferred on towns generally under chapter 62, second volume of *The Code*, is empowered by ordinance to prohibit an unmarried minor, except when acting as the agent of his parent or guardian, from entering any bar-room or room where spirituous, vinous or malt liquors are kept for sale.

It was not contended on the argument that the Legislature, in the exercise of its police power, was not authorized to prohibit infants from exposing themselves to such evil influences, nor was it necessary to discuss the question whether the Legislature was empowered by the Constitution to delegate to the municipality the authority to enact the ordinance set forth in the special verdict, unless we discover upon a careful examination that the power has been granted either expressly or by fair implication. 1 Dillon Mun. Corp., sec. 89; *State* v. *Webber*, 107 N. C., 962; 15 Am. and Eng. Enc., 1039. The first contested point, therefore, is whether under the permission to make by-laws, contained in the charter, or under the general act, the authority to enact this ordinance has been incidentally conferred. The Supreme Court of New Jersey stated, in the case of *Taylor* v. *Griswold*, 2 Green, 222, the doctrine upon which the decision of the question involved depends: "Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. The Legislature may enact laws imposing restraint upon the natural liberties of the people for the benefit of the public morals, provided no constitutional right of the individual is violated, but where a municipal corporation, which is a public agency created by the law-making branch of the government, undertakes to pass laws in derogation of common right it is incumbent upon such municipality to show clearly not only that the Legislature is warranted by the Constitution in delegating but has actually conferred the power claimed. Dillon says (1 Dillon, sec. 325, citing *Taylor* v. *Griswold*, *supra*, in support of the proposition): "An ordinance cannot legally be made which contravenes a common right unless the power to do so be plainly conferred by a valid and competent legislative grant, and, in cases relating to such right, authority to regulate conferred upon towns of limited powers has been held not necessarily to include the power to prohibit." One of the cases cited by Dillon to sustain this proposition is *Hayden* v. *Noyes*, 5 Conn., 391, where the Court held that the authority of a town to regulate fishing in a navigable stream within its limits did not warrant it in enacting a by-law prohibiting fishing within its boundaries.

The commissioners of the town of Monroe may by virtue of its charter "make such by-laws, rules and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land." The word law, in its general sense, includes statute and common law as well as the Constitution, and the term "laws of the land" has been so expressly interpreted by high authority. 12 Am. and Eng. Enc., 950, note 1; *Insurance Company* v. *Wright*, 22 Am. and Eng. Corporation cases, 662, note. The language which was incorporated in *Magna Charta* and transplanted into all of our State Constitutions and has been declared equivalent to "due process of law" is law (not laws) of the land. The phrase "laws of the land" was construed in the case cited to include both common and statute law, and by other Courts to embrace Constitutions also. Cooley, p. 32. Is the ordinance in derogation of a right which the common law from time immemorial has conferred upon a minor twenty years old? An individual right is that which a person is entitled to have or to receive from others or to do under the protection of the law. 21 Am. and Eng. Enc., 406; *Railroad* v. *Roty*, 6 Neb., 40. The common law clearly includes all principles and rules of action established for the security of the rights of personal liberty and private property which are not embodied in some express legislation. "Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or *restraint* unless by due course of law." Anderson's Law Dic., 619; 1 Bl. Com., 134. Mr. Blackstone says further of this privilege of free locomotion that it is "a right strictly natural, and the law of England has never abridged it without sufficient cause, and that in this Kingdom it cannot ever be abridged at the mere discretion of the magistrate without the explicit permission of the laws." This is a statement of the well-settled doctrine that even a statute passed by the Legislature must be construed strictly when it operates to any extent to repeal or abrogate any principle of common law, which protects personal security, personal liberty or private property.

Has an infant a right of locomotion which the common law protects and other persons are bound to respect? A person *sui generis* may enter any house where goods, wares or groceries are sold, subject only to the right of the proprietor to eject him for misconduct. An infant labors under disabilities, as to the power to make contracts or execute a will, to hold office and to do certain other acts; but the common law imposes no more restraint upon his locomotion than upon the movements of an adult, except such as may be incident to parental authority, when exerted. If, therefore, the Legislature had attempted by express statute to prohibit all minors, except those specified in the ordinance, from entering houses of the particular classes therein mentioned, the law would have been at least subject to a strict construction whenever the Courts should be called upon to enforce it. When the duty is imposed on the Courts of close scrutiny in searching for a power claimed by implication, it is doubly a duty to see that it exists in some shape and has not been abused in the particular exercise of it, where the legislation drawn in question purports to be under delegated power and operates, if conferred at all, in derogation of a personal right recognized by the common law. Such power does not pass, as we have seen, under the general grant of authority to make all needful by-laws, rules and regulations (Dillon, sec. 325); but not only has the Legislature omitted to confer, but it has positively prohibited, the making of any ordinance not consistent with the laws of the land (whether statute or common law), such as that elementary principle declaratory of the right of an infant to go where he may choose, subject only to the superior authority of the parent to control him, or the Legislature in plain terms to impose restraints for his own protection or the general welfare of the public, and not repugnant to the Constitution.

The other powers conferred upon municipal corporations under the general law are embodied in *The Code*, §§3801 and 3802, which are as follows:

"They may establish and regulate their markets and prescribe at what place within the corporation shall be sold marketable things, in what manner, whether by weight or measure, may be sold grain, meal or flour, if the flour be not packed in barrels, fodder, hay or oats in straw, may erect scales for the purpose of weighing the same, appoint a weigher, fix his fees and direct by whom they shall be paid. And it shall not be lawful for the commissioners or other authorities of any town to impose any tax whatever on wagons or carts selling farm products, garden truck, fish and oysters in the public streets thereof.

"They may pass laws for abating or preventing nuisances of any kind or for preserving the health of the citizen."

In these two sections we find enumerated all of the express powers to pass ordinances, except such as arise under the authority to levy taxes and to repair, improve and open public streets and sidewalks, contained in the sections immediately preceding and following those quoted above. So that if the ordinance, for a violation of which the defendant is indicted, was not passed by virtue of the power to preserve health or abate or prevent nuisances, there is no express warrant for its enactment in the general statute, as there is no sufficient grant of authority to pass it in the charter. The power conferred upon the municipality is not to create by legislation a nuisance not previously known to the law, but to protect the people of a town from annoyance by refusing or prohibiting the creation of what already comes within the legal definition of nuisance. Cooley Const. Lim., pp. 242 and 741, note 2; *Yeates* v. *Milwaukee*, 10 Wall., 497; *Salem* v. *Railroad*, 98 Mass., 431.

In *State* v. *Mott*, 61 Md., 297, cited by Judge COOLEY to sustain substantially the proposition we have laid down, the facts were that the city of Baltimore enacted an ordinance providing that it should "not be lawful for any person, persons or body corporate to work, operate or continue in use, for the purpose of burning oyster shells or stone lime, any kiln situated or erected within the limits of the city of Baltimore, under a penalty," etc. The defendant was charged in the indictment with operating a limekiln *within* the limits of the city of Baltimore for the purpose of burning oyster shells and stone lime, etc. The authority to pass the ordinance was claimed under a provision of the charter empowering the city "to pass ordinances to preserve the health of the city and to prevent and remove nuisances," being practically identical with section 3802, the only difference being in the order of conferring the powers and in the use of the word "abating" instead of removing, in precisely the same sense. The Court held that it was not a nuisance *per se* to burn a limekiln at any point within the limits of the city, and the corporation was not authorized by grant of power to prevent and remove to prohibit an act not necessarily a nuisance. See also, *Ward* v. *Little Rock*, 41 Ark., 526. Judge COOLEY also cited the case of *Fertilizer Co.* v. *Hyde Park*, 70 Ill., 634, in which the Court held in effect that where the Legislature explicitly gave to the town the power after the lapse of two years "to determine what were nuisances and to abate the same," the corporation was not authorized to declare any act a nuisance, which was not a nuisance at common law, till after the expiration of the time mentioned. The Court in this case in a very elaborate argument maintained the right of a private corporation to manufacture fertilizer, despite any general power in the town to protect or prevent nuisance, unless it should create in the conduct of its business a nuisance at common law. It has been held also, for similar reason, that a municipal corporation has no more power to legalize an acknowledged nuisance than it has to prohibit what does not amount to a nuisance as such. *Pettie* v. *Johnson*, 56 Ind., 139; 15 Am. and Eng. Enc., 1185; How. & B. Mun. Corp., 252. It seems needless to multiply authorities, as we might do almost indefinitely, to show that the word "nuisance" in the statute must be interpreted according to its technical meaning.

The Legislature has the authority (no longer questioned in this State) to prohibit the sale of spirituous, vinous or malt liquors, and possibly to declare bar-rooms a nuisance, but the towns cannot prohibit the sale of liquors without express authority from the Legislature to do so. Had the town attempted by ordinance to prohibit the sale of spirituous liquors to minors only the ordinance would have been void, whether the statute on the subject were in force or repealed, because no such authority is conferred upon it, either expressly or by implication. How, then, does the corporation acquire the power to prohibit a boy, upon whom the law has imposed no such restraint, from entering a house where a business legalized by our statutes is being conducted? It is doubtless desirable that the youth of the State should be guarded against the temptations to which frequenters of such places are subjected. Legislation which will legalize what the Town Commissioners of Monroe have attempted to enact, if it is deemed constitutional, can probably be had for the asking. But the violation of constitutions or statutes under the specious plea of reforming the world in obedience to a higher law is neither excusable upon moral nor defensible upon legal grounds.

I think, for the reasons which I have stated, that neither under the provision of the charter commonly known as the general welfare clause nor under the power to protect health and prevent nuisances can the governing authorities of a municipality enact a valid ordinance purporting to prohibit a boy of twenty years of age from entering where business is conducted presumably under the sanction of the law. The Legislature may put the sale of intoxicants under ban of the law so completely that a place where it is illicitly sold shall be deemed a nuisance, but while such business houses are licensed by law town commissioners cannot brand them, without authority, as places unfit for boys who frequent other stores and saloons.

It was contended on the argument of the case, and not without authority and reason, that had the Legislature instead of the municipality enacted a law prohibiting minors from frequenting the business houses mentioned in the ordinance in question, the statute would have been unconstitutional and void. Without passing upon that question or even conceding for the sake of the argument that the Legislature has the power to prevent a minor from being employed in or even entering a place where intoxicants are sold, it would be none the less essential, in order to give validity to a similar law passed by a municipality, to show the delegation to the corporation of the authority claimed either expressly or by fair implication.

The authorities cited, therefore (Black on Mun. Leg., sec. 42, and numerous cases from the Courts of other States), in support of the legislative authority to pass statutes of the same purport, have no necessary bearing upon the case in the absence of any attempt to delegate the power which the town attempted to exercise.

I think that the Judge below erred in instructing the jury upon the special verdict to find the defendant guilty, and a new trial ought to be awarded.

STATE v. BEN. BRIDGERS.

Larceny—Sufficiency of Evidence.

1. Evidence which only raises a conjecture or suspicion of the guilt of one charged with an offence, but does not warrant a reasonable conclusion of his guilt, ought not to be submitted to the jury.
2. Where, on a trial for larceny, the prosecuting witness testified that, on his refusing to sell the defendant any mule shoes on credit, defendant sat down on a keg containing some, and after rattling the shoes for a while with his hand went out of the store with his right hand in his pocket; that he, the witness, suspected defendant of taking some shoes, but did not know whether any were taken or not; and defendant testified that he bought mule shoes which were soon

afterwards found in his possession from one M., who testified that he did not remember selling them to the defendant, but might have done so, as there were many people about his store that day: *Held*, that the evidence raised only a conjecture or suspicion of defendant's guilt, and did not reach the dignity of legal evidence.

INDICTMENT for larceny, tried before *McIver, J.*, and a jury, at Fall Term, 1893, of CLEVELAND Superior Court.

The defendant was charged with stealing two mule shoes, the property of R. H. Green and others.

For the State, Toliver Green testified that on August 9th the defendant came to the store of R. H. Green & Bro., of which witness is a member, to buy a pair of mule shoes on credit. The witness refused to let him have them and the defendant then took a seat on a keg containing some mule shoes and was rattling the shoes for a while, rattling those hanging on the edge of the keg. The defendant then left the store, putting his right hand in his trousers pocket, his left side being toward the witness. The witness, suspecting the defendant of having taken some shoes, asked a colored man, one Ran Ray, to follow the defendant. The witness stated on cross-examination that he did not know that he had lost any mule shoes at all, or how many he had had before the defendant entered his store, or had after the latter left, not knowing how many there were in the keg, nor could he identify as his those the defendant was subsequently found to have.

Ran Ray testified that he went after the defendant, and soon overtook him, and, after walking some distance, they sat down to rest, when the defendant took two mule shoes from his pocket and remarked that he had gotten them at the store, not naming any, however, and was going to pay them back to a Mr. Scruggs from whom he had borrowed two. The defendant made no attempt to hide the shoes, and did not seem frightened about anything. When witness and defendant reached Scruggs' house, defendant went in.

David Scruggs testified that the defendant brought him a pair of mule shoes in return for a pair defendant had gotten from him some days before. The defendant had borrowed a mule from one Prill Jolly, was to put shoes on the mule for its use, and secured two shoes from the witness.

It was in evidence that, upon being accused of stealing the shoes, the defendant said that he had bought them at Mooresboro, from a man he did not know, and described a store, Mooresboro being nearly six miles from R. H. Green & Bro.'s store. The description was nearly, but not quite, that of the store of M. G. Martin.

Mr. Martin testified that he did not remember selling the shoes to the defendant on the day in question, but might have done so, as it was a big day and there were many people in town. He could not identify his shoes. No witness was able to identify the shoes the defendant gave Mr. Scruggs as those of R. H. Green & Bro.

The defendant introduced no testimony, but asked the Court to instruct the jury that there was not sufficient evidence to warrant a conviction, it not being proved that any mule shoes had been stolen from R. H. Green & Bro., nor even that they had lost any, nor that the shoes found in the possession of the defendant did not belong to him, and if they were stolen, it was not proved that they were the Greens'. The Court refused to give this instruction, being of the opinion that there was evidence to go to the jury. There was a verdict of guilty. The defendant moved for a new trial on the ground that the Court had erred in refusing the instruction asked and in the charge as made, and that the verdict was contrary to the evidence. Motion overruled, and defendant appealed.

The Attorney General and *Mr. S. F. Mordecai*, for the State.

Mr. G. A. Frick, for defendant (appellant).

MACRAE, J.: We do not think there was evidence sufficient to warrant the conviction of the defendant. There was no positive testimony that any goods were taken from the prosecutor; indeed the witness expressly testified that he did not know whether he had lost any mule shoes at all, or how many he had before the defendant entered his store, or how many he had afterwards. The testimony of this witness that he suspected the defendant is of no force. The jury must be governed by the evidence of the facts upon which the suspicion was based, and not by the suspicion itself. A conjecture or a suspicion might arise unfavorable to the defendant, but evidence only sufficient for this purpose is not legal evidence. Unless this evidence, purely circumstantial in its nature, was of such character as to warrant a reasonable conclusion of the guilt of the defendant, it ought not to have been submitted to the jury. *State* v. *Bruce*, 106 N. C., 792. The defendant attempted to account for his possession of the shoes. If his statement had been contradicted there would have been a circumstance against him, but the State offered a witness for the purpose who failed to contradict him. Indeed, his testimony left it not unreasonable to presume that the defendant might have procured them at another place. Taking the testimony as a whole, it was only sufficient to raise a conjecture or suspicion, and did not reach the dignity of legal evidence. There must be a New Trial.

STATE v. B. F. FREEMAN.

Practice—Certiorari—Failure to Docket Transcript.

Where an appellant, without whose default the case on appeal was not settled by the Judge, failed to docket the transcript of the record at the next succeeding term of this Court, but applied at such term for a *certiorari*, the writ will not be allowed.

The defendant was tried and convicted at Fall Term, 1893, of Madison Superior Court, before *Armfield, J.*, on an indictment under section 1062 of *The Code*, and appealed. Without default of his own (as defendant alleges) the case on appeal was not settled by the Judge below, and at this (February, 1894) Term of this Court he applied for a *certiorari*, but did not cause the transcript of the record to be docketed.

The Attorney General, for the State.
Mr. J. F. Morphew, for defendant (petitioner).

Clark, J.: This is a petition for *certiorari*. It was filed at the first Term of this Court after the trial below. The ground of the application is that the case on appeal was not settled by the Judge without any default on the part of the appellant. The petitioner, however, failed to docket at such term the transcript of the record proper. In *Pittman* v. *Kimberly*, 92 N. C., 562, it is held by Smith, C. J., that if for any reason the Judge fails to settle the case on appeal on disagreement of counsel the appellant must, in proper time, docket the transcript of the record proper and then move for a *certiorari* to bring up the "case on appeal," and that it is the duty of the appellant, not of the Clerk, to have the record sent up. In that case the appeal was dismissed, even though, unlike the present case, the transcript of the record proper had been filed at the next Term before the motion to dismiss was made. In this case no record proper has yet been filed, and there is nothing to show that the case was properly constituted in the Court below. There is nothing before us save the petition.

Pittman v. *Kimberly*, *supra*, is exactly in point, and has often been cited and approved. *Stephens* v. *Koonce*, 106 N. C., 255, 256; *Porter* v. *Railroad*, 106 N. C., 478; *State* v. *Preston*, 104 N. C., 733; *Bailey* v. *Brown*, 105 N. C., 127; *Pipkin* v. *Green*, 112 N. C., 355. Motion denied and appeal dismissed. Dismissed.

STATE v. JACOB STEVENS.

Retailing Liquor Without License—City Ordinance—State Law—Fine—Penalty.

1. Where, by section 36 of ch. 111, Acts of 1883, the Legislature empowered the city of Asheville to levy and collect upon every license to retail spirituous or malt liquors a tax not exceeding $500, and by section 19 of said act authorized the Board of Aldermen of said city "to regulate and restrain tippling-houses": *Held*, that the city had authority to impose such license tax and to pass all needful ordinances to carry into effect the intent and meaning of the act of the Legislature and to impose a fine or penalty for the violation of the same.
2. Although the act of selling liquor without license in violation of the revenue laws of the State and of its police regulations, and also of the ordinance of a city, is *one* act, the offences are different, for which the offender must answer in the proper jurisdictions; therefore an ordinance of a city imposing a fine or penalty for selling liquor without license does not conflict with the general laws of the State prohibiting the sale of liquor without license, and is therefore valid.

3. Such ordinance being valid, and the violation of it being made by statute a misdemeanor of which a Mayor has jurisdiction, a prosecution under it does not conflict with any criminal action pending or that may be instituted against the defendant on account of the alleged selling as an act in violation of the general State law.
4. The words "fine" and "penalty" being used interchangeably, an objection to an ordinance that it provides a "fine" instead of a "penalty" for its violation, is without force.

AVERY, J. dissents.

CRIMINAL ACTION, tried on appeal from a judgment of the Mayor's Court of Asheville, before *Thomas A. Jones*, Judge of the Criminal Court of BUNCOMBE County, at January Term, 1894.

The defendant was charged with selling liquor in the city of Asheville without having obtained a license therefor, in violation of ordinance No. 649 (adopted in the year 1887), which is as follows:

"If any person or persons shall retail spirituous, vinous or malt liquors, or any preparation containing alcohol, in the city of Asheville without license, he shall on conviction be fined fifty dollars, and if such retailing be without State license such person or persons shall be bound over to the Superior Court of Buncombe County."

On the trial it was admitted that an indictment against the defendant for the offence of retailing liquor in violation of the general statute, section 1076 of *The Code*, was pending in the Criminal Court of Buncombe County.

It was also admitted that the Board of Aldermen of Asheville, at their meeting in May, 1893, adopted the following ordinance, to-wit:

"By virtue of the power conferred by sections 35 and 36 of an act of the General Assembly of North Carolina entitled 'An act to amend the charter of the city of Asheville,' ratified the 8th day of March, 1893, for the purpose therein mentioned, and by virtue of the subsequent acts of said Legislature amendatory thereof, especially ch. 223 of the Acts of 1889, the Board of Aldermen of the city of Asheville do hereby impose and levy the following general, special and privilege taxes upon the subjects, etc., hereinafter mentioned, etc. * * * * * * *

"14. Upon every license to retail spirituous or malt liquors at each place of business, to be paid semi-annually in advance, $1,000."

The defendant moved to quash the warrant upon the following grounds:

"1. The Mayor has no jurisdiction, in that the offence of retailing liquors without a license is prohibited by the general laws of the State.

"2. The ordinance is void, in that the Board of Aldermen of the city of Asheville had no authority to pass such ordinance.

"3. The Mayor had no jurisdiction, in that the offence is not cognizable before a Justice of the Peace."

The motion to quash was sustained on the second ground above set forth, and the State appealed.

The Attorney General and *Mr. Louis M. Bourne*, for the State.

Mr. J. H. Merrimon, for the defendant.

BURWELL, J.: By section 36 of chapter 111 of the Laws of 1883 the aldermen of the city of Asheville were empowered to levy and collect "upon every license to retail spirituous or malt liquors a tax not exceeding five hundred dollars." This provision, if it stood alone, would seem to indicate the intent to confer upon the municipal authorities the power to issue licenses to those whom they saw fit to allow to carry on this business, and to impose a tax not exceeding the sum named for the privilege of so doing. If these words are read in connection with section 19 of the said act, wherein the Board of Aldermen are authorized "to regulate and restrain tippling-houses," it becomes manifest, we think, that they had authority to impose a license tax on the business of retailing liquor, if carried on within the corporate limits of the city of Asheville.

Having this authority to impose a license tax on this business and also to pass all laws and ordinances necessary to carry the intent and meaning of that act into effect, it must follow that the municipality was invested with power to enforce the payment of this license tax (*The Code*, §3804). Taxes laid on property can be collected by seizing and selling the property taxed, but, inasmuch as license taxes are very often not collectible by seizure of the effects of the licensee, revenue laws provide for the enforcement of the payment of such taxes by the imposition of fines or penalties upon those who violate their provisions by carrying on the taxed trade or business without having paid the privilege tax and obtained the required license. The revenue laws, both of this State and the United States, contain such provisions. Indeed, without them such laws would be almost nugatory. The same act, as, for instance, the selling of a pint of whiskey, may be a violation of both the State and Federal laws, and may be punished in each jurisdiction; and this will imply no encroachment of one authority into the province of the other. This is well settled. And so, the selling of a pint of spirits in the city of Asheville may be a violation of the revenue law of the State and of its police regulations (*The Code*, §1076), and also of the ordinance of the city adopted to secure the collection of its revenue. While the act is one the offences are different, and the offender must answer for each offence in the proper jurisdiction. In the one prosecution he would be charged with selling the spirituous liquor without having first obtained the license required by the State law; while in the other prosecution he would be charged with selling the spirits without having first obtained the license required by the city ordinance. The latter charge constitutes a distinct offence, and is not punishable except under the provision of the ordinance and section 3820 of *The Code.*

Authorities need not be cited to show that if an ordinance of a city provides for the punishment by penalty of an act which is prohibited and punished by State law the ordinance is invalid and void. That well-established principle has no application here. An assault is punishable by the general law of the State. That act in inself, whenever and however done, is a violation of the law of the State. Municipal councils are not permitted to legislate on that subject, for the State has assumed control of it. The act of selling a pint of spirituous liquor is not necessarily criminal or contrary to law. But that act, if done on Sunday to an unmarried minor, by one who has no license to sell such liquor either from the Federal, State or city authorities, becomes an ingredient of five or six different charges against the perpetrator that may be presented against him in different jurisdictions. A single act may be an offence against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Arrington* v. *Commissioners*, 12 S. E. Rep., 224. In *Ruble* v. *State*, 51 Ark., 170, cited in the case above referred to, it is said of an act of selling liquor to a minor by one who had no license that the seller was guilty of two separate and distinct offences, and might be indicted for each of them. This seems to be well settled. Black on Intoxicating Liquors, section 555.

The offence charged against this defendant, to-wit, that he sold spirituous liquors in the city of Asheville without having paid the tax levied on that business and without having obtained from the *city* a license so to do, is, as we have said, a distinct and separate offence from that for which it seems he is indicted in the Criminal Court of Buncombe County; and this prosecution by the city for a violation of its ordinances can in nowise conflict with any criminal action that has been or may be instituted against the defendant on account of the alleged selling as an act violative of the general State law.

Our attention has been called to the provision of section 33 of ch. 294 of the Laws of 1893 (Revenue Act), where it is enacted in regard to the licensing of dealers in liquors by the County Commissioners that "the license authorized within an incorporated town or city under this section shall first be granted by the authorities of such town or city." The effect of this proviso is merely to require the licensing of an applicant by the city or town authorities as a condition precedent to the granting of a license by the County Commissioners, and to declare that a license issued to one who has not complied therewith shall be void. *Hillsboro* v. *Smith*, 110 N. C., 417.

We conclude, therefore, that no one of the three reasons assigned for quashing the warrant was valid. The Board of Aldermen of the city of Asheville had authority to adopt such an ordinance, plainly conferred by the acts above referred to. The ordinance in nowise conflicts with any of the general laws of the State, and is reasonable. It being a valid ordinance, the violation of it is made by statute a misdemeanor of which the Mayor had jurisdiction.

The objection to the ordinance that it provides that one who violates it shall be *fined* instead of imposing a penalty is without force. In *State* v. *Cainan*, 94 N. C., 880, an ordinance of the city of Raleigh that imposed a *fine* was declared valid, and in *State* v. *Cainan*, 94 N. C., 883, the words penalty and fine are used interchangeably. To the same effect is *State* v. *Earnhardt*, 107 N. C., 789. It was conceded in the argument before us that the amendment to the warrant should have been allowed, and the exception to the allowing of the amendment was abandoned. There is Error.

STATE v. CALVIN COLEY AND THOMAS COLEY.

Murder—Degrees—Trial—Evidence—Character Witness—Opinion of Witness—Sanity.

1. A witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question.
2. It is settled that the Legislature may by a saving clause in an act retain the provisions of the existing law in force as to all crimes committed prior to its passage; hence, the Act of 1893, changing the degrees of homicide and providing unequivocally that it should operate prospectively, does not apply to homicides theretofore committed.
3. Where, in the trial of two persons for murder, it appeared that in a mutual affray and an unequal contest between the deceased, who was unarmed, and the two defendants, one of the latter threw deceased to the ground and held him there while the other procured an axe and crushed his skull, it was not error to instruct the jury that the defendants were guilty of murder, the circumstances of the holding by one and the hitting by the other defendant being inconsistent with the legal conception of a killing in the heat of passion engendered in an encounter.
4. While testimony as to mental capacity falls within the exception to the rule that no witness, other than qualified experts, shall be allowed to express his opinion in a matter submitted to the

inquiry of a jury, yet insanity cannot be proved by general reputation or hearsay.

5. It is the right of a defendant to be present when anything is said or done at the trial that may prove prejudicial to his interests; but where no instructions were given to the jury in the absence of the defendant he cannot complain that the Court, in his absence, asked the jury if they desired any further instructions.

INDICTMENT for murder, tried at January Term, 1894, of FRANKLIN Superior Court, before *Bynum, J.*, and a jury.

The testimony was that the deceased, S. Tucker, a Jew peddler, came to the house of Lucy Brewer and Pinkie Williams, in Gold Mine Township, late in the evening in July, 1892, and there met the defendant Cal. Coley. Later the defendant Tom Coley came to the house also. All ate supper together and the deceased was asked to stay all night. The defendant Cal. accused the deceased of being the man who had charged him with being a "kinkey-head nigger," which the deceased denied.

Cal. Coley, one of the defendants, testified that "after eating supper we got into the passage and began talking. The peddler said he was tired, and pulled off his clothes and lay down on the bed; then got up and went out. I asked him if he was not the man who called me a "kinkey-head nigger"; he said "no"; I asked him twice; he said "no," and rose for a fight; took hold of me and I of him; we scuffled two or three minutes; I had no weapon; he had on his underclothes; my brother took part with me; he held him and I hit him; we did not scuffle more than five minutes before I struck him; I did not know whether he took his pistol out or not; could not see whether he had a pistol in his hand or not, but he had one, for I found it in his valise after he was dead; he was attempting to fight me as much as I did him; I only hit him one lick; Tom held him on his side; I hit him with the eye of an axe;

we took his body into the woods and burnt his clothes and pack; got $159 in money."

The testimony of the woman, Lucy Brewer, was that in the scuffle Cal. Coley called for an axe, which Tom carried to him: that Tom refused to strike deceased with the axe, whereupon Cal. told Tom to hold deceased and he would strike him, which he did, the deceased begging them the while not to kill him; that after carrying the body into the woods, covering it with pine-straw and burning the clothes and peddler's pack, they took the money found on his person and all went to Norfolk, Va.

In December, 1893, persons hunting found the remains, and upon inquiry and investigation they were ascertained to be those of S. Tucker. Lucy Brewer, having returned to the neighborhood, was suspected, and charged with the murder, or complicity in it, and shortly made a confession, and her testimony was used for the arrest and conviction of the defendants.

At the trial, upon the close of the testimony, the defendants' counsel insisted that the Act of 1893, dividing the crime of murder into first and second degrees, applied to this case, and that it was the province of the jury to say in this case, under proper instructions, whether defendants or either of them were guilty of murder in the first or second degree or of manslaughter. His Honor instructed the jury that if they believed the testimony of the defendant Cal. Coley, both the defendants were guilty of murder in the first degree, as the Act of 1893 was not applicable. Defendants excepted.

Upon the trial the defendants proposed to ask a witness what was the general reputation of Tom Coley for sanity, but upon objection the question was not allowed, and defendants excepted.

After the jury had taken the case and had been out about fourteen hours the Court caused them to be brought into the court-room, the prisoners not being present, and asked them if they were disagreed on any matter of law or fact. They replied, "On a question of fact." Thereupon his Honor said, "I cannot aid you in that," and they again retired. Defendants' counsel excepted because the prisoners were not present. At 5:30 o'clock on Saturday the jury were again sent for and asked the cause of their disagreement. One of the jurors replied that they were uncertain as to the meaning of one of the instructions that had been given. The prisoners were then brought into Court, and in response to the request of the jury the Court repeated the instruction referred to.

The Court then said, "I have given you the law; your oaths require you to return your verdict in accordance with the law and the evidence, and if from the facts, as you find them to be and the law as I have laid it down to you, you are satisfied beyond a reasonable doubt that the defendants, or either of them, is guilty of murder, you should return that verdict."

The defendants excepted, first, because the prisoners were not in the court-room when the Court made the first inquiry of the jury, and, second, because what was said to the jury in regard to their duty as to their oaths in returning a verdict of murder.

The jury returned a verdict of murder, and from the judgment thereon the defendants appealed.

The Attorney General, for the State.
Mr. F. S. Spruill, for defendants (appellants).

AVERY, J.: No principle of evidence is more clearly settled in North Carolina, nor by a longer line of decisions, than that a witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question. *State* v. *Wheeler*, 104 N. C., 893; *State* v. *Gee*, 92 N. C., 756; *State* v. *Perkins*, 66 N. C., 126; *State* v. *Parks*, 3 Ired., 296. This the witness failed to do, and the objection to the proposed testimony as to character was properly sustained. There was no error in the refusal of the Court either to instruct the jury that they could return a verdict of murder in the second degree (under the Act of 1893) or that it was in their power to return a verdict for a less offence than murder. It is settled beyond all room for dispute that the Legislature in the act repealing a law may by a saving clause retain the provisions of the existing law in force as to all crimes committed prior to its passage. *State* v. *Halford*, 104 N. C., 874.

The controversies that have heretofore provoked discussion have arisen upon the question whether particular language could be construed as implying a legislative intent to limit the operation of an act to offences committed after its passage and leave the pre-existing law in force as to those previously committed. *State* v. *Massey*, 103 N. C., 356; *State* v. *Long*, 78 N. C., 571; *State* v. *Williams*, 97 N. C., 455; *State* v. *Putney*, Phillips' Law, 543. As the purpose that the Act of 1893 should operate prospectively and that the common law should remain in force as to homicides committed prior to its passage is expressed in unequivocal terms in the proviso to the act, we think that the question whether the offence with which the prisoners are charged should be classified as murder in the second decree did not arise.

The view presented by the testimony of the prisoner Calvin Coley is that most favorable to the defence, and though he stated that there was a mutual affray, commencing between the deceased and himself, he admitted that his brother, the prisoner Thomas Coley, from the first took part with him and very soon after the engagement began had the deceased upon the ground and held him down while he (the prisoner Calvin) got the ax and knocked him in the head. This witness admitted that the deceased used no pistol or other weapon and was engaged in an unequal encounter with two men. When, in such an unequal contest, the deceased was thrown to the ground and pinioned there by one while the other crushed his skull with an axe, the slight provocation shown was not sufficient to mitigate the offence of killing with a deadly weapon and with such deliberate cruelty. The force used was excessive and the manner of using it evinced the fixed purpose to kill. They were not acting on the defensive, because the deceased was held prostrate upon the ground, nor under the *furor* of one who, blinded by the momentary passion provoked by an assault, strikes without deliberation. The holding of the deceased by one till the other procured the axe, and the slaying by the other of a person so perfectly helpless, is inconsistent (because of its deliberate character) with the legal conception of a killing in the heat of the passion previously engendered in an encounter.

There was no error in giving the instruction numbered 16, and which embodies the principle we have stated.

The general rule is that no witness, other than such as are declared by the Court upon examination to be experts, shall be allowed in the face of objection to express his opinion upon matters to which the inquiry of a jury is being directed. One of the exceptions to this rule is that any person who has sufficient intelligence to testify as to any subject is allowed to express an opinion upon a question of the sanity of another person, to be weighed by the jury according to their estimate of its value. But while testimony as to mental capacity falls within the exception to the rule governing the admissibility of proof of opinions, we know of no principle upon which hearsay evidence of what experts or non-experts have thought or said of the sanity or insanity of a particular person can be made competent. The attempt to prove insanity by general reputation was not less objectionable and incompetent than would have been the attempt to show by a third party what a particular individual thought or said.

It was the right of the prisoners to be present when anything was said or done that might prove prejudicial to their interests, but the Court gave the jury no instructions in their absence. They had no ground to complain, because the Judge took the precaution to inquire whether the jury desired any such information as would make it necessary to send to the jail for them. In repeating the instruction previously given, and in giving the admonition complained of, we do not think that the Judge overstepped the limit of his power by expressing or even intimating an opinion as to the facts.

Upon a careful review of all of the exceptions we are of opinion that there is No Error.

STATE v. EDWARD J. FULLER.

Murder—Jurors—Peremptory Challenge by State—Misconduct of Jury—Discretion of Trial Judge—Indifferent Juror—Failure of Judge to Exercise Discretion on Ground of Lack of Power—New Trial—Presumption of Premeditation from Use of Deadly Weapon.

1. Under section 1200 of *The Code* it is error on the trial of capital cases to permit the State to peremptorily challenge a juror after he has been passed by the State and tendered to the prisoner. (CLARK, J., dissenting).

2. The discretionary power of the trial Judge in respect to challenges of jurors is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by section 1200 of *The Code* than he has to allow more than four of such challenges. (CLARK, J., dissenting).

3. Where the trial Judge found the facts in regard to the alleged misconduct of the jury his refusal of a new trial on that ground is not reviewable in this Court.

4. Where a trial Judge rests his refusal to exercise his discretion upon the mistaken opinion either that it is not vested in him or that the facts are not such as to call for its exercise, it is error; therefore,

5. Where, in a trial for murder, a juror upon his *voir dire* swore that he had neither formed nor expressed an opinion as to the guilt of the prisoner and was accepted and, after verdict and upon motion for a new trial, it appeared from affidavits that such juror had declared that, if summoned on the jury, he would hang the prisoner, and the trial Judge refused the motion because "the affidavits were not sufficiently strong": *Held*, that this was a refusal to exercise the Court's discretion on the ground of a lack of power and was, therefore, erroneous. (CLARK, J., dissenting).

6. The use of a weapon likely to produce death raises a presumption of malice only, and not of premeditation and deliberation. (CLARK, J., dissenting).

7. Where a trial Judge, in defining two degrees of murder, inadvertently instructed the jury that the fact of killing with a deadly weapon, when admitted, raised the presumption or justified the inference that there was premeditation instead of malice, it was an erroneous instruction that could not be cured by any subsequent proposition that did not clearly remove from the minds of the jury the impression created by such instruction. (CLARK, J., dissenting).

INDICTMENT for murder, tried before *Bryan, J.*, and a jury, at Fall Term, 1893, of CUMBERLAND Superior Court.

The exception to the ruling of the Court permitting the State to challenge a juror, who had been tendered to the prisoner, appears in the opinion.

The prisoner presented affidavits, charging improper conduct on the part of the jury and of the officer who had them in charge, and showing, or tending to show, bias on the part of J. C. Tew, one of the jurors, and from said affidavits the Court found the following facts:

"That eleven of the jurors were shaved by one of their number in their room on Saturday evening, the third day of the trial, and the other (a colored man) was carried to a barber-shop in town about two hundred yards from the room in which the remaining eleven jurors were. The officer, locking the door of said room, put the key in his pocket and accompanied the colored juror to the barber-shop and back, and when he returned found everything as he left it. They were supplied with two quarts of whiskey on Saturday afternoon. One quart was bought for Sunday, the jurors themselves furnishing the money and the officer buying it for them. Every juror drank out of it; each juror took one drink, consuming one quart. One quart was first bought, and some time after, same afternoon, the other quart. The jurors played cards from time to time pending the trial, the cards being furnished by the proprietor of the boarding-house. The friends of the deceased had been boarding at the house to which the jury were carried, but they did not remain there after the jury were carried there. That on another occasion the officer took one of the jurors, who was troubled with his bowels, to a back lot to obey a call of nature, and at the request of the juror, who was complaining of pain, carried him into a saloon, where the juror and officer each took a drink with him—the remaining eleven being left in the room and the same locked up; that on another occasion one of the jurors requested the officer to take him to a livery-stable not far off in order to remove his horse to another stable, and the officer did so, and also allowed the colored juror to go with them, leaving the other ten jurors locked up in the room until they returned; that the officer allowed the jurors to use and read the *Wilmington Messenger* from day to day during the trial, which contained what purported to be a full report of the evidence and abstracts of the argument of counsel, instructing them not to read the account of the 'Fuller' trial; that on the night before the verdict was rendered the jury, without the knowledge or consent of the prisoner or Court, were taken by the officer to a prayer-meeting in the Baptist chuch; that they sat together, the officer sitting with them, and all in his immediate view, and that there was nothing improper in their conduct while at church, going to or from.

"The above facts are found by the Court upon the affidavits filed by the prisoner, and the affidavit of E. M. Waddell, the officer of the jury, which he filed in answer to the rule served upon him for contempt, in violation of his duty as such officer, and which he asked might be read in response to the affidavits as to his conduct.

"It was agreed between counsel on both sides that the officer might take the jury to church on Sunday, which he did. This is the only agreement made by counsel as to the jury. (Signed) HENRY R. BRYAN,
"*Judge Presiding.*"

"The officer, answering a rule, was fined by the Court one hundred and fifty dollars, and sentenced to jail for thirty days. Upon the sworn testimony of his physician that imprisonment would imperil his life, he being an old and feeble man, and further testimony of his not having over fifty dollars in property, the fine was stricken out and the judgment suspended.

"(Signed) HENRY R. BRYAN,
"*Judge, etc.*"

Facts found by the Judge and his ruling thereon entered of record:

"One of the jurors, J. C. Tew, having been asked the question whether he had formed and expressed the opinion that the prisoner at the bar was guilty, answered in the negative, and was thereupon accepted.

"The prisoner, after the verdict, offered the affidavits of S. C. Godwin and J. R. West tending to show that the juror had expressed an opinion, which affidavits were as follows:

"S. C. Godwin, being duly sworn, says: 'That on Monday, January 22, 1894, late in the afternoon, affiant had a conversation with J. C. Tew and J. R. West relative to the trial of the Fuller case, in which conversation affiant asked said Tew (who was one of the jurors who tried the case) and West, 'What are they doing in the Fuller case?' to which West said, 'They are doing nothing.' Affiant then asked them if they were summoned on the *venire*, or if the *venire* was summoned, to which West replied, 'No, and they had better not summon us unless they want him (Fuller) hung, had they, John Curt?' (addressing Tew). J. C. Tew then said, 'You bet not.'

"J. R. West, being duly sworn, says: 'That on Monday of the first week of this term of the Court he was at the house of his uncle, S. C. Godwin, in Flea Hill Township, Cumberland county, in company with the said J. C. Tew, one of the jurors in the above entitled case; that the subject of conversation was the Fuller trial. S. C. Godwin asked if they had summoned the *venire*. This affiant said, 'No, they had done nothing with him yet, and they need not summon me and Tew, because we would hang him; would not we, Tew?' Whereupon the said Tew said, 'You bet we would,' or words to that effect."

"Upon which foregoing affidavits prisoner asked the Court to find that the juror Tew was not an indifferent juror at the time he was accepted by the defendant. The Court declined so to find, being of the opinion that the affidavits were not sufficiently strong.

"(Signed) H. R. BRYAN,
"*Judge, etc.*"

The single exception to the charge which is discussed in the opinion is set forth therein in full. From the judgment pronounced upon a verdict of guilty the prisoner appealed.

The Attorney General and *Mr. T. B. Womack*, for the State.

Messrs. R. H. Battle, Geo. M. Rose, C. M. Cooke and *W. W. Fuller*, for the prisoner (appellant).

AVERY, J.: After all of his peremptory challenges had been exhausted the juror Hawley was passed by the State and tendered to and accepted by the prisoner. As the Clerk was about to swear him he asked to be excused upon the ground that he was an intimate and life-long friend to the prisoner and connected with him by marriage. Further investigation developed the fact that no relationship either by consanguinity or affinity existed between the prisoner and the juror, but that a first cousin of the prisoner had married the juror's second cousin. After correctly ruling that no sufficient cause of challenge had been shown, and after it had been made to appear that the juror had previously asked the counsel for the prosecution to excuse him, but without assigning any reason for making the request, the Court overruled the objection of the prisoner and permitted the State to challenge the juror peremptorily.

The statute (*The Code*, §1200) provides that "in all capital cases the prosecuting officer on behalf of the State shall have the right of challenging peremptorily four jurors; provided said challenge is made before the juror is tendered to the prisoner, and if he will challenge more than four jurors he shall assign for his challenge a cause certain." The right of peremptory challenge is given to the prosecuting officer, coupled with the express condition that it is to be exercised before the particular juror is tendered to the prisoner, or not at all. The statute imposes no such restriction as to challenges for cause. *State* v. *Vestal*, 82 N. C., 563. Hence, where a juror is tendered to a prisoner and on *voir dire* states that he had formed and expressed the opinion that the prisoner is not guilty (*State* v. *Jones*, 80 N. C., 415), or where even after he is both tendered and accepted he then, on coming to the book to be sworn, states that he is related to the prisoner within the ninth degree (*State* v. *Boone*, 80 N. C., 461), in either case, the Court unquestionably has the power to allow the challenge for cause. For the same reason where the fact of killing was admitted and a prisoner charged with murder relied upon insanity as a defence, the Court had the power to permit the State to challenge a juror who after being accepted stated that he was firmly fixed in the opinion that the prisoner was insane at the time of the killing, and that this belief could not be removed by hearing any amount of evidence. *State* v. *Vann*, 82 N. C., 631. Where a prisoner charged with homicide has accepted a juror, and before the jury is impaneled, the *nisi prius* Judge, acting as a trier, ascertains that the juror has formed and expressed the opinion that the prisoner is not guilty, it is within his sound discretion to allow or disallow a challenge for such cause, and his ruling is not reviewable, as it is not in any such case of challenge to the favor. *State* v. *Green*, 95 N. C., 611. Had the juror Hawley stated that he was related to the prisoner within the ninth degree, sufficient cause of challenge would have been shown (*State* v. *Perry*, Busbee, 320, and *State* v. *Potts*, 100 N. C., 457), and the exception to the ruling of the Court would have been groundless. But the statute defines in plain and unequivocal terms the limit to the right of objection on the part of the State without assigning cause, and fixes unmistakably the extent of time within which it is to be exercised. None of the authorities cited for the prosecution extend the right of peremptory challenge beyond the time of tendering the juror to the prisoner, and if this Court had inadvertently made a ruling so plainly repugnant to and subversive of the provision of the statute, it would have been hard measure to adhere to such a precedent where human life is involved. The discretionary power of the Judge was confined to challenges for cause. He had no more authority to extend the time for making peremptory challenges beyond the limit fixed by the statute than he had to increase the number allowed to the State beyond four. The question of the proper interpretation of the language of the statute is one for this Court, and its meaning seems so plain as to require but little further discussion of this exception, after showing that it has never received a construction different from that which we now place upon it. After the juror had been tendered it was the right of the prisoner to demand that he be sworn, unless the challenge had been allowed for cause and not peremptorily on behalf of the State.

After the rendition of the verdict affidavits were filed tending to show misconduct on the part of the jury actually impaneled and of the officer who had charge of them. The Judge found the facts bearing upon this subject, and his denial of the motion on that ground is not reviewable here. *State* v. *Best*, 111 N. C., 643. But two affidavits were filed tending to show that one of the jurors who was chosen (John C. Tew) declared on his *voire dire* that he had not formed and expressed the opinion that the prisoner was guilty, whereas before he was summoned on the special *venire* he had said in effect that it would not be well to choose him as a member of the jury, as he would hang the prisoner. When the affidavits were offered his Honor seems, either of his own motion or at the request of counsel, to have entered on the record proper a statement of the action taken in reference to them. After reciting that the affidavits relating both to the misconduct of the jury and the bias of the juror Tew, and finding the facts and entering his judgment upon the motion for a new trial in so far as it was founded upon such alleged misconduct, his Honor proceeded to find and enter upon the record proper the finding that Tew had declared on his *voir dire* that he had not formed and expressed the opinion that the prisoner was guilty, he was chosen and sworn as a juror, the Court proceeded to pass upon and enter of record its action on the other branch of the motion for a new trial and to refuse to find that Tew was not an indifferent juror, because the "foregoing affidavits" (those of West and Godwin, which were evidently spread upon the record as exhibits) were "not sufficiently strong." Instead of questioning the credibility of the affiants or stating broadly that, in the exercise of the discretion vested in him, he refused the motion in so far as it was founded on the alleged bias of Tew because the affidavits were not sufficiently strong to produce belief in their truth, for credibility does depend upon the production of a strong but of an apparently truthful statement. It is impossible to understand the order of the Court upon this branch of the motion for a new trial, the reference in it to the two affidavits recorded with it and the previous recitation that the Court started out to enter a finding as to the bias of one juror as well as the misconduct of the whole panel, unless we draw the natural if not irresistible inference that his Honor intended to find as a fact that the juror Tew declared that he had not formed and expressed the opinion that the prisoner was guilty, and then, instead of eliminating the facts from the two affidavits or falling back upon his discretionary power, to hold as a conclusion of law that, conceding the truth of the allegations contained in the affidavits, they were not sufficiently strong to warrant the exercise of his discretionary power. It is familiar learning that where a *nisi prius* Judge rests his refusal to exercise his discretion upon the mistaken opinion, either that it is not vested in him or that the facts are not such as to call for its exercise, it is error. The rule is so established, because a Judge acting under a misapprehension of the law might, in cases like that before us, refuse to follow the dictates of a sound discretion solely because he had been misled by an erroneous view as to his power. If the motion had been refused on the uncontradicted affidavits without comment, or with the statement that it was denied in the exercise of a sound discretion, it would not have been reviewable. *State* v. *Smallwood*, 78 N. C., 560.

It is immaterial whether the Court started out to find the facts at the request of the prisoner's counsel or on its own motion. It would have been a work of supererogation to request the Judge to do what he was already doing voluntarily. But the principle announced in the recent case of *State* v. *DeGraff*, 113 N. C., 696, and *State* v. *Best*, *supra*, must not be misunderstood. If the Judge, of his own motion or on request of the prisoner's counsel, starts out with the avowed purpose of finding the facts, and then states as a conclusion of law that certain affidavits, if admitted to be true, are not sufficient to call for the exercise of his power, instead of eliminating the facts from the affidavits, it has never been held by this Court that a prisoner who is not in fault, under such circumstances, is precluded from excepting to a mistake of law made by the

Court as to the extent of its own discretionary power. The Judge might have found the facts from the affidavits or other testimony in a very small compass; he might either have declared his disbelief of them, or he might in a few words have claimed the right to exercise a sound discretion, despite the fact that they were filed. He chose to do none of these things, but to rest his ruling upon the idea that the affidavits were not "sufficiently strong." Sufficiently strong to do what? except to accomplish the only purpose for which they could have been filed—call for the exercise of the sound discretion vested in the Court. If his Honor had meant he did not deem the affidavits credible, he would have pronounced them unworthy of belief, not wanting in strength. The affidavits might well have been weak or strong, and yet scrupulously in accord with the truth. If counter-affidavits had been filed the Judge would have so stated, and would probably have eliminated his findings from all that were submitted. The impression that the Judge distrusted his power is strengthened by the remark, subsequently made in the very moment of announcing his conclusion, that he had never known of an instance where a verdict such as this had been set aside. If a Judge is reluctant to pass upon the credibility of such affidavits, yet is unwilling to evade review by falling back upon his discretion, can we deduce any rule or inference from adjudicated cases that will prevent him from pursuing a course which is so manly and which evinces so just an appreciation of the gravity of the situation? If his Honor deemed the affidavits insufficient in law to evoke the exercise of his power, it was just to the prisoner and creditable to him to allow the case to be so fairly presented. Supposing it to be true, then, that Tew, intending and desiring to insist upon a verdict of guilty of murder in the first degree, if selected as a juror, and to have the prisoner hanged, which purpose presupposed either the belief that he was guilty or a corrupt purpose to punish him even if innocent, falsely declared upon his *voir dire* that he had neither formed nor expressed the opinion that he was guilty, and thereby contrived to have himself chosen, had the Court the power to set aside the verdict and grant a new trial? Where a juror fraudulently procures himself to be selected, and swears falsely that he has not formed the opinion that the prisoner is not guilty, the presiding Judge has the power, in furtherance of the duty which the law imposes upon him to see that all trials are fair and impartial, to order a mistrial after the jury has been impaneled on an indictment for murder. *State* v. *Bell*, 81 N. C., 591. And it is not material whether it appears in such a case that the fraud was practiced at the instance of or through the agency of the prisoner, or with his subsequent assent. It was held sufficient that he was about to avail himself of the benefit of it. *State* v. *Washington*, 89 N. C., 535; *Ibid.*, 90 N. C., 664. However rarely it may become the duty of a presiding Judge to exercise the power to grant a new trial where a prisoner is found guilty of a crime punishable with death, there can be no question as to its existence. Thompson & M. on Juries, section 302; *State* v. *Tilghman*, 11 Ired., 552. What is ordinarily left to sound discretion becomes a high duty when it is once conceded that justice has miscarried by the fraudulent contrivances of a juror in procuring his own selection by perjury. If it be true that the juror Tew was so full of prejudice as to declare in effect that if chosen he would endeavor to have the prisoner hanged, and that he afterwards imposed himself on the counsel as an indifferent juror, it is manifest that the trial of the prisoner, in so far as this particular juror was a factor in it, was a mockery of justice. If the affidavits were believed they unquestionably showed facts that justify the setting aside of the verdict. It is true that we may expect such evidence to be adduced often, when the presiding Judge can from his stand-point see that it is not to be relied upon, but in all such cases he has but to rest his decision upon the sufficiency of his own power rather than the insufficiency of the testimony to make it no longer the subject of review here. We do not hold, nor is it necessary that we should decide, that evidence of fraudulent intrusion of such a juror into the panel, if believed, would make it in all cases, even where there is no reasonable view of the evidence consistent with the innocence of the prisoner, the imperative duty of the presiding Judge to grant a new trial. If the affidavits, admitting their truth, were sufficient to warrant the exercise of the discretionary authority of the Court, the ruling was erroneous. We think that if the fraudulent intrusion of a friend of a prisoner accomplished by swearing that he has never expressed the opinion that the prisoner is not guilty is sufficient ground for a new trial, the justice and reasonableness of the converse proposition must be conceded also. The fact that an enemy has contrived by perjury to get into the panel in order to convict is sufficiently potent as evidence of injustice and wrong to the prisoner to justify the Judge in setting aside the verdict, in the exercise of the power entrusted to him to meet just such extraordinary emergencies. We think, also, that the first exception to the charge is well taken, and must be sustained.

In defining murder in the first degree the Court said: "The killing being admitted, and nothing else appearing or proved, the Court charges you that no presumption is raised that it is murder in the first degree, and unless the circumstances show beyond a reasonable doubt that there was a deliberate, premeditated, preconceived design to take life, it is murder in the second degree. The act should not only be willful, premeditated, malicious, but it must have been committed with the formed intention to take life; a fixed design that the act shall result in the death of the party assaulted, a fully formed, conscious design to kill, and with a weapon prepared for the purpose. Premeditation may be inferred or presumed from the use of a deadly weapon in the possession of the party using it, unless the contrary be made to appear." The prisoner could not justly complain of the proposition embodied in all that precedes the last sentence of the foregoing extract from the charge. The mere fact of killing, when admitted, raised no presumption that it was murder in the first degree, and it was the duty of the jury, unless they were satisfied beyond a reasonable doubt that there was a deliberate, premeditated and preconceived design on the part of the prisoner to take life and that the act of killing was committed in pursuance of such fixed design, to find the prisoner guilty of no higher offence than murder in the second degree. When the jury were told that they were at liberty to presume or to draw the inference from the mere fact that a deadly weapon was used, leaving out of view any other evidence offered to show that the prisoner was in the very act of killing, pursuing a deliberate and preconceived purpose, a very grave question was raised, which it is the duty of this Court to settle in this the very first case involving a construction of the late act, defining what constitutes murder in the first and second degrees. Unquestionably now, just as before the enactment of the statute, the use of a weapon likely to produce death raises a presumption of malice, and therefore the jury may infer, when there is evidence that the killing was done with such a weapon, that the person charged is guilty of murder in the second degree. *State* v. *Townsend*, 66 Iowa, 741. But the use of a deadly weapon does not *ipso facto* bring a killing within the definition of a murder "perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate or premeditated killing, or committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony," but relegates it as a merely technical murder, depending upon the artificial weight given to testimony, to the second-class. Probably ninety-nine out of every hundred homicides are caused by the use of a deadly weapon, and if in every case where its use is provoked by insulting language (not deemed provocation in law) which is resented with fatal result on the spur of the moment, the offence is presumably murder, but little has been accomplished by the legislative attempt to classify cases which before fell within the definition of murder, and to subject to the death penalty only the more heinous offenders. The Pennsylvania statute is substantially the same as ours, and by that statute the first classification of criminal homicides into two degrees of murder and manslaughter was made in this country. 2 Bishop Cr. Law, sec. 703. Prior to the statute (says Bishop, sec. 726) every killing of "malice prepense" was murder. "Since the statute, when to this another degree ef malice is added, the particular killing becomes murder in the first degree, but when there is no such addition made it is murder in the second degree." The intentional killing with a deadly weapon raised a presumption, not of premeditation or deliberation, but of malice only. 19 Am. and Eng. Enc., 65; *State* v. *Collins*, 8 Ired., 407; *State* v. *Willis*, 63 N. C., 26; *State* v. *Brittain*, 89 N. C., 502. When, therefore, not only proof of malice, but of something more, was made requisite for a conviction for the capital felony of killing, the prosecution could no longer make out a *prima facie* case of premeditated and deliberate murder by evidence which gave rise to a presumption of the malice only.

Under the operation of the new law every slaying upon provocation deemed sufficient in law to arouse anger, and under the influence of the passion thus engendered, is manslaughter, though done with a deadly weapon. But in the absence of such mitigating circumstances the law presumes malice from the manner of killing just as it did before its enactment. The existence of malice, however, if admitted or presumed from the use of a pistol, does not of itself warrant the inference of premeditation, though the preparation and use of the pistol doubtless is evidence proper to be submitted with other facts and circumstances as tending to show the existence both of premeditation and deliberation. "Where the act is committed deliberately with a deadly weapon," says Wharton, 2 Cr. Law, sec. 944, "and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed." It has been held by the Supreme Court of Pennsylvania, construing the statute, re-enacted here almost *in totidem verbis* (*State* v. *Drum*, 58 Pa. St., 9), that while the use of a deadly weapon is *prima facie* evidence of malice, and while the fact that it has been intentionally used to inflict a mortal wound throws the burden upon the accused to show circumstances that will mitigate the killing to manslaughter, the presumption raised is no higher than that the homicide is murder in the second degree. In order to constitute murder in the first degree there must be evidence of express as contradistinguished from implied malice. "Any unlawful killing of a human being with malice aforethought is murder; but if nothing further characterizes the offence it is murder in the second degree; to constitute the higher offence there must be willfulness, deliberation, premeditation." *People* v. *Cox*, 76 Cal., 285.

In the case of *Romans* v. *State*, 41 Wis., 312, the Court approved the instruction that the jury would find the defendant guilty of murder in the first degree if they should find from the evidence not only that he "shot deceased and thereby caused his death," etc., but provided, also, they should "believe from the evidence beyond a reasonable doubt that the defendant did the shooting with the premeditated design to kill the deceased." It must appear "not only that the defendant is guilty of feloniously killing the deceased, * * * but that such killing was done willfully, deliberately and with premeditation." Wharton's Law of Homicide, 368. Where the presumption of slaying with malice aforethought only is raised, the proof falls short of justifying the inference of guilt by failing to amount also to *prima facie* proof of premeditation and deliberation, which are essential elements of the higher crime. Wharton, *supra*, 369; *Green* v. *State*, 45 Ark., 281; *Atkinson* v. *State*, 20 Texas, 522. That a homicide may be willful in so far as the intent is evinced by the use of a weapon likely to produce death, and yet not deliberate or premeditated within the meaning of the statute, seems to be generally conceded by the Courts where the words of our statute have received an interpretation. *State* v. *Hill*, 69 Mo., 451; *McQueen* v. *State*, 1 Lea (Tenn.), 285; *Aveline* v. *State*, 64 Ind., 96.

Where the presiding Judge in defining the two degrees of murder inadvertently instructs the jury that the fact of killing with a deadly weapon, when admitted, raises the presumption or justifies the inference that there was premeditation instead of malice, it is necessarily an incurable error. No subsequent proposition inconsistent with that can be held to have removed the erroneous impression fastened on the minds of the jury in the beginning, but, while the Court reiterates in many forms the instruction that it is incumbent on the State, in order to a conviction of murder in the first degree, to show beyond a reasonable doubt that there was both premeditation and deliberation, there is in fact nothing in the charge clearly inconsistent with the idea that the jury were still left to draw the inference that there was premeditation from the bare fact that a pistol was used by the prisoner to inflict the mortal wound.

The passage of the Act of 1893 marks an era in the judicial history of the State. As far as we can ascertain, every other State had previously divided the common law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the Courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon with him who waylays and shoots another in order to rob him of his money or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder this new law will fail to accomplish the object for which it was framed. Elsewhere the Courts have generally followed the lead of Pennsylvania, and we, too, have adopted the interpretation given by her Courts to the law which our Legislature has borrowed from her statutes. It is not the severity of laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved and often applauded the conduct of juries in disregarding the instructions of Judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offence. The experience of a few years will probably demonstrate here as elsewhere that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offences differing widely in the degree of moral turpitude exhibited. For the reasons pointed out the prisoner is entitled to a New Trial.

CLARK, J., dissenting: *The Code*, §1200 is unambiguous. It restricts the State as to its peremptory challenges so that they can only be demanded as a right before the juror is tendered to the prisoner. This section does not purport to be a restriction upon the Court in the exercise of its immemorial privilege and duty of permitting challenges or excusing jurors at any time before the jury is impaneled whenever this is required in the interest of a fair and impartial trial. It is certainly too late in this State to contest the settled principle that the defendant has the right to reject, not the right to select, a juror. In the present case no man sat on the jury to whom the prisoner objected. He has no just ground of complaint that one did not sit on the jury whom he would have wished to do so. The juror challenged himself. He said he was a life-long and intimate friend of the prisoner, and connected with him by marriage. An investigation of the latter statement showed that the connection by marriage was not such as in law to disqualify him. The relations of the juror with the prisoner were not previously known to the State. The State had not exhausted its peremptory challenges. The juror did not think he was an impartial juror, and challenged himself. The Court might well have excused him *ex mero motu.* It exercised its legitimate duty in permitting the State to peremptorily challenge him, when it had lost its *right* to demand to do so, by not exercising it sooner. In at least seven cases this Court has held that the trial Judge may in his discretion permit a juror to be challenged by the State after he has been tendered to the defendant. *State* v. *Green*, 95 N. C., 611; *State* v. *Adair*, 66 N. C., 298; *State* v. *Jones*, 80 N. C., 415; *State* v. *Boon*, 80 N. C., 461; *State* v. *Vestal*, 82 N. C., 563; *State* v. *Vann*, 82 N. C., 631, and *State* v. *Cunningham*, 72 N. C., 469, and there are several others. It is true that in most, if not all, these cases the challenge was for cause. But the principle is exactly the same. As a matter of right the State can challenge neither for cause nor peremptorily after the juror is tendered to the prisoner. The allowance of any challenge to the State thereafter is not of right, but in the discretion of the Court. Such power is wisely vested in the discretion of the Court, as was said by PEARSON, C. J., in *State* v. *Adair*, *supra*, "to secure a jury indifferent as between the State and the prisoner." In *State* v. *Green*, *supra*, ASHE, J., calls attention to the fact that the challenge allowed the State after the juror was tendered "was not strictly a challenge for cause, but a challenge to the favor, which is when the party has no particular cause of challenge, but objects that the juror is not indifferent on account of some suspicion of partiality, prejudice or the like." That challenge was held to have been correctly allowed. That case is exactly the case here, only the State was more hardly dealt with here, in being required to exhaust one of its peremptory challenges. In the above cause the juror was stood aside for cause allowed in the discretion of the Court after he was tendered. It will be difficult to know what is the law applicable to the trial of capital cases if a principle heretofore settled by so many precedents is to be summarily swept aside. The juror properly challenged himself. He knew he ought not to sit on the case. The prisoner has no right to select any juror. His right lies solely in rejecting improper or objectionable jurors.

The juror, John C. Tew, on his *voir dire* swore that he had not formed or expressed the opinion that the prisoner at the bar was guilty. After verdict, when the jurors had been discharged, and doubtless had gone to their homes, an affidavit was filed by some one that Tew had made a different statement. The Judge stated that the affidavit was not sufficiently strong, and declined to set the verdict aside on that ground. The palpable meaning is that the affidavit was not sufficiently strong to convince him that Tew had foresworn himself. We do not know the character or credibility of the party making the impeaching affidavit. He may have been entirely unworthy of belief, or quite otherwise. But it rested with the presiding Judge to pass upon that. He did so. He said the affidavit was not sufficiently strong, and, as it did not satisfy him, declined the motion. This is, in effect, a distinct finding of fact. But it has been too recently decided by this Court in *State* v. *DeGraff*, 113 N. C., 688, affirming former precedents, to need discussion that, where the facts are not found by the trial Judge and spread upon the record, the affidavits of grounds for a new trial cannot be considered in this Court. If this ruling of the Judge was not a finding of fact that the affidavit was insufficient to convince him, we cannot consider the affidavit. *State* v. *DeGraff*, *supra.* If it was in effect such finding, the finding is conclusive. It would be a cruel misapprehension of the language of the impartial Judge who presided at the trial to construe him as meaning to find that the impeaching affidavit was true, that a juror had perjured himself in order to get upon the jury, but that such fact was not strong enough to warrant setting aside the verdict. The Judge does not find the impeaching affidavit to be true and insufficient, but he finds the affidavit not strong enough. This, coupled with his refusal to set aside the verdict, can mean but one thing—that he did not believe the impeaching affidavit. It will be dangerous to act as juror in a capital case—always and to every one sufficiently unpleasant—if, after the juror has been discharged and gone home, the fact that some person can be found to file an affidavit that a juror had perjured himself on his *voir dire*, which affidavit the presiding Judge disallows and refuses the motion—if upon such facts a new trial can be obtained upon appeal on the ground that the juror had committed perjury. The presiding Judge did not so find. On the contrary, he refused the motion based upon such affidavit. There is certainly nothing in the action of the Judge which warrants the juror being pilloried for all time in the printed report of this case as having sworn falsely on his *voir dire* in order that he might convict a fellow-being of a capital offence, nor that the Judge held as a matter of law that such fact was insufficient to warrant a new trial.

Nor is there any error under our precedents in the charge of the learned Judge. The killing with a deadly weapon having been shown, the law presumes malice aforethought, as charged in the indictment. No other principle is more indisputably settled by all our authorities. Malice aforethought *is* premeditation. The Judge correctly told the jury that such malice or premeditation might be presumed or inferred from the use of a deadly weapon. The facts and circumstances in proof might mitigate the offence to murder in the second degree or to manslaughter, or to self-defence, but the burden was upon the prisoner to show the matters of mitigation or excuse, either by the State's evidence or by the evidence offered in his behalf. *State* v. *Rollins*, 113 N. C., 734, and numerous cases there collected.

There can be no discussion of the wisdom of the policy of dividing the crime of murder into two degree. The Legislature is the sole judge of that, and the wisdom of its action cannot be called in question in this co-ordinate department, and, in fact, it has not been. That question does not arise. But in all cases, whenever the proof of certain facts raises a presumption and shifts the burden upon the defendant, the presumption is as to the offence with which the defendant is charged in the indictment, and not of an inferior offence. The indictment here charges the prisoner with the crime of murder in the first degree, not murder in the second degree. The prisoner under this bill can be found guilty of the felony whereof he stands charged, or of inferior degrees of it according to the proof, as murder in the second degree, manslaughter, assault, or he can be acquitted. But when the killing with a deadly weapon is shown the law presumes malice, and upon all our authorities the prisoner should be convicted (as the learned Judge charged) of the crime whereof he stands charged, unless he shows that state of facts which would mitigate the offence to an inferior offence, as murder in the second degree, or manslaughter, or self-defence, etc. In establishing the offence of murder in the second degree the Legislature did not intend to abolish the offence of murder in the first degree. It only meant that the offence should be mitigated to that if the evidence shows that the prisoner is entitled to the benefit thereof. The killing with a deadly weapon having been shown, the jury under all our precedents should have found the prisoner guilty of murder in the first degree, as charged in the indictment, unless matters were shown reducing it to a lesser offence. While the statute certainly creates the lesser offence of murder in the second degree there is nothing in the statute which intimates a change in the ancient and well-settled rule of law which raises a presumption of guilt as to the offence, murder as charged, from the fact of killing with a deadly weapon. Nor is there reason for the Courts to change a rule founded in profound wisdom and so long and uniformly adhered to. Already in trials for homicide the State is at enormous disadvantage. While the law establishes an inferior degree of murder, there is no ground to render it more difficult for the State to establish guilt or to give added technical advantages in the trial to the defendant, which will virtually abolish convictions for murder in the first degree in all cases. The humanity of our law already gives the prisoner on trial for a capital offence every possible advantage consistent with the enforcement of the law. There is no reason they should be added to. He has twenty-three peremptory challenges, while the State has but four.

His guilt must be shown beyond a reasonable doubt. Twelve jurors must concur in finding him guilty. He has the great advantage that erroneous rulings of the presiding Judge, if in his favor, cannot be corrected, while a single erroneous ruling against him vitiates the whole proceeding. The sympathy of the jury in favor of a fellow-being in jeopardy of his life is easily appealed to and readily evoked. The legal technicalities of the trial are quickly availed of, if one is violated, by skillful counsel. Under these circumstances convictions for capital offences are rare, and more men each year suffer that punishment without process of law than by its authority. The executive and legislative departments of the Government strive in vain to prevent the growing lawlessness in that regard. Whether capital punishment should be abolished or not rests with the people acting through their accredited representatives. But as long as the penalty of death is denounced by the statute it should be borne in mind that a trial for a capital offence is a solemn, serious proceeding, which society has decreed as necessary for its safety and well-being. It is not to be approached from the sentimental or humanitarian side. The sole object should be the cold, impartial ascertainment of the facts pertaining to the charge. When, notwithstanding the great advantages guaranteed the prisoner by the humanity of the laws and the humane interpretation and administration of them, both by this Court and by the humane Judges who administer the law in the Superior Courts—when, notwithstanding all this, the unanimous verdict of a jury has pronounced the prisoner guilty, and the Judge has overruled the exceptions in his favor, there is a duty which the Courts owe to society. The presumption in the Court below is in favor of the innocence of the prisoner. When that is overcome by verdict and judgment on appeal every presumption in this, as in all other cases, is in favor of the correctness of the proceeding below. That presumption has not been overcome. This Court rules only upon errors of law assigned in the rulings of the Judge. The rulings excepted to in this case are each and all sustained by ample authority, as above cited.

If there are matters outside of the challenged rulings of the Judge which make in favor of the prisoner, it is beyond the power of this Court to consider them. The prerogative of mercy is unlimited, but its exercise rests not here. It is entrusted to another department of the Government.

STATE v. WILLIAM HALL AND JOHN DOCKERY.

Indictment for Murder—Jurisdiction—Crime Committed in Another State.

1. One State or sovereignty cannot enforce the penal or criminal laws of another or punish crimes or offences committed in and against another State or sovereignty.

2. Where the fatal stroke and death occur in the same State, the offence of murder at common law is there complete, and the Courts of that State can alone try the offender for that specific common law crime.
3. Where one puts in force an agency for the commission of crime he, in legal contemplation, accompanies the same to the point where it becomes effectual—the criminal act is the impinging of the weapon on the party injured, and that is where the impingement happens; therefore, where one, standing in North Carolina, by the firing a bullet, killed another standing in Tennessee, the assault or stroke was in the latter State and at common law the murder was committed in that State and its Courts alone have jurisdiction of the offence.
4. Nor, in such case, is jurisdiction conferred upon the Courts in this State by the statute (section 1197 of *The Code*) which provides that "in all cases of felonious homicide, where the assault shall have been made within this State, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the manner, to all intents and purposes as if the person assaulted had died within the limits of this State"; the term "assault," as used in such statute meaning, not a mere *attempt*, but an injury inflicted in this State and resulting in death in an another State.
5. Nor, in such case, will the fact that both the defendant and deceased were citizens of North Carolina confer jurisdiction on the Courts of this State, for the personal jurisdiction generally claimed by nations over their subjects who have committed offences abroad or on the high seas does not exist as between the States of the Union under their peculiar relation to each other.

INDICTMENT for murder, tried at Spring Term, 1893, of CHEROKEE Superior Court, before *Graves, J.*, and a jury.

The defendants (Hall as principal and Dockery as accessory before the fact) were charged with the killing of Andrew Bryson on the 11th July, 1892, in Cherokee county. The testimony tended to show that when the shooting occurred, by which deceased was killed, the defendants were in North Carolina and the deceased in Tennessee.

The defendants asked for the following instructions (among others):

"1. That it devolves upon the State to satisfy the jury beyond a reasonable doubt that the killing took place in the State of North Carolina; and if the State has failed to satisfy the jury beyond a reasonable doubt that the deceased received the wound from which he died whilst he was in the State of North Carolina, the defendants are not guilty.

"2. That if the prisoners were in North Carolina and the deceased was in Tennessee, and the prisoners, or either of them, shot the deceased whilst he, the deceased, was in the State of Tennessee, and the deceased died from the effects of the wounds so received, the defendants are not guilty."

The instructions were refused, and after a verdict of guilty the defendants appealed from the judgment rendered thereon.

The Attorney General, for the State.

Mr. G. S Ferguson, for defendants (appellants).

SHEPHERD, C. J.: There was testimony tending to show that the deceased was wounded and died in the State of Tennessee, and that the fatal wounds were inflicted by the prisoners by shooting at the deceased while they were standing within the boundaries of the State of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offence within the jurisdiction of this State.

It is a general principle of universal acceptation that one State or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offences committed in and against another State or sovereignty. Rorer's Interstate Law, 308; Story's Conflict Laws, 620–623; The Antelope, 10 Wheaton, 66–123; *State* v. *Knight*, Taylor's Rep., 65; *State* v. *Brown*, 1 Haywood, 100; *State* v. *Cutshall*, 110 N. C., 538.

There may, by reason of "a statute or the nature of a particular case," be apparent exceptions to the rule, as if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it: or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretenses; or does any other crime in our own locality against our laws, he is punishable, though absent, the same as if he were present." 1 Bishop Cr. Law, 109–110; *State* v. *Cutshall, supra.*

These cases, however, are but instances of crimes which are considered by the law to have been committed within our territory, and in nowise conflict with the general principle to which we have referred. Starting, then, with this fundamental principle and avoiding a general discussion of the subject of extra-territorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination.

It seems to have been a matter of doubt in ancient times whether, if a blow were struck in one county and death ensued in another, the offender could be prosecuted in either, though according to Lord Hale (Pleas of the Crown, 426) "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck, and the jury might there," he adds, "inquire both of the stroke and death." 1 Starkie Cr. Pl., 2 Ed., 304; 1 Hawks, Pl. of Crown, ch. 13; 1 East, 361. But to remove all doubt in respect to a matter of such grave importance, it was enacted by the statute 2 and 3 Edward VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law or by re-enactment, is in force in many of the States of the Union, and as applicable to counties within the same State its validity has never been questioned (see Acts 1891, ch. 68, and also The Code of Tennessee, §5801), but where its provisions have been extended so as to affect the jurisdiction of the different States its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not indeed uniformly, sustained. *Simpson* v. *State*, 4 Hump. (Tenn.), 461; *Green* v. *State*, 66 Ala., 40; *Commonwealth* v. *Macloon*, 101 Mass., 1; *Tyler* v. *People*, 8 Mich., 326; *Hemmaker* v. *State*, 12 Mo., 453; *People* v. *Burke*, 11 Wend., 129; *Hunter* v. *State*, 40 N. J., 495.

Statutes of this character "are founded upon the general power of the Legislature, except so far as restrained by the Constitution of the Commonwealth and the United States, to declare any willful or negligent act, which causes an injury to person or property within its territory, to be a crime." Kerr on Homicide, 47. See, also, remarks of Justice BRADLEY in the *habeas corpus* proceedings of Guiteau, reported in the notes to the case of *United States* v. *Guiteau*, 47 Am. Rep., 247; 1 Mackey, 498. In many of the States there are also statutes substantially providing that where the death occurs outside of one State, by reason of a stroke given in another, the latter State may have jurisdiction. See our act, *The Code*, §1197. The validity of these statutes seems to be undisputed, and, indeed, it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the Supreme Court of the District of Columbia in Guiteau's case, *supra*, in which the authorities are collected and their principle stated with much force by Justice JAMES. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions, and it is equally clear that where the stroke and the death occur in the same State the offence of murder at common law is there complete, and the Courts of that State can alone try the offender for that specific common law crime.

The turning point, therefore, in this case is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of death; and upon this question the authorities all seem to point in one direction.

In the early case of *Rex* v. *Coombs*, 1 Leach Crown Cases, 388, it was held that "if a loaded pistol be fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the Admiralty Jurisdiction; for the offence is committed where the death happened and not at the place whence the cause of the death proceeds." See also, 1 East. 367, and 1 Chitty Cr. Law, 154.

In the case of *United States* v. *Davis*, 2 Sumner, 482, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed—Mr. Justice STORY, in the course of his opinion, said: "What we found ourselves upon in this case is that the offence, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our Government may be presumed (since we have a Consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect and the death happened on board of the schooner, and the act was, in contemplation of law, done where the shot took effect. * * * We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen."

In *Simpson* v. *State*, 17 S. E. Rep., 984, it was held by the Supreme Court of Georgia that one who, in the State of South Carolina, aims and fires a pistol at another who at the time is in the State of Georgia, is guilty of the offence of "shooting at another" although the ball did not take effect, but struck the water in the latter State. The Court said: "Of course the presence of the accused within this State is essential to make his act one which is done in this State, but the presence need not be actual; it may be constructive. The well-established theory of the law is that where one puts in force an agency for the commission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual. * * * So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia the law regards him as accompanying the ball and as being represented by it up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this State the mere fact of missing would not render the person who shot any the less guilty; consequently, if one shooting from another State goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle."

The Court approved of the language of CAMPBELL, J., in

Tyler v. *People*, 8 Mich., 320, that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative."

In speaking of crime committed by one out of the State, through an innocent agent, Judge RORER says: "In such case the innocent person in the State is the means used to perpetrate the crime therein, just as if a person who shoots out of a State across the line into another State and therein intentionally kills another person is in such case guilty of committing the criminal act within the State without himself being at the time therein." Interstate Law, 326.

In *Commonwealth* v. *Macloon*, *supra*, Justice GRAY says that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction."

In *State* v. *Carter*, 3 Dutcher, 499, the Supreme Court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and shooting across the border kills one in New Jersey. When that is so the blow is in fact struck in New Jersey. It is the defendant's act in this State. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the State as where he stands in it."

In *State* v. *Chapin*, 17 Ark., 560, the Court said: "For example, if a man standing beyond our boundary line, in Texas, were, by firing a gun or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect." See also, *People* v. *Adams*, 3 Denio, 207.

In *Stillman* v. *Manufacturing Co.*, 3 Woodb. & M. (U. S.), 538, WOODBURY, J., said: "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two States, though sometimes in different forms as here. * * * So, if one fires a gun in one State, which kills an individual in another State, there may be the offence of using a deadly weapon in the first State (that is, we suppose, by statute) and committing murder by killing in the second State."

In speaking of the validity of acts similar to that of Edward VI., *supra*, Mr. Black, in an article in the *Central Law Journal* (Vol. XXXVIII, p. 318), remarks: "There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory. For, of course, the act can amount to nothing more than an attempt, until the fatal agency comes in contact with the body of the victim." See, also, upon this subject *American Law Review*, Vol. XX, p. 918.

In view of the foregoing authorities it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee, and it is also clear that the offence of murder at common law was committed within the jurisdiction of that State. If this be so it must follow that unless we have some statute expressly conferring jurisdiction upon the Courts of this State, or making the act of shooting under the circumstances a substantive murder, the offence with which the prisoners are charged can only be tried by the tribunals of Tennessee.

It is true that in Wharton's Criminal Law, 288, it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offence," but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are *uttered* in one State to take effect in another (*U. S.* v. *Worrall*, 2 Dall., 383), or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (*Green* v. *State, supra*), or where an accessory before the fact in one State to a felony committed in another was held to be indictable in the State where he became accessory (*State* v. *Chapin, supra*), or in certain cases of false pretenses, or in conspiracies where an overt act is committed at the place of the trial, or where by statute a particular "section" of an offence committed in one jurisdiction is there made indictable; as, for instance, the act of shooting or unlawfully using a deadly weapon within the State, as in the present case. In some instances there may be concurrent jurisdiction of the whole offence, and in others there may exist the jurisdiction of an attempt in one State and of the consummated offence in another. In a note to the preceding section the author thus explains: "The place of such residence (that is, where the offence is started) has jurisdiction over the attempt or conspiracy as the case may be. The place of the consummation has jurisdiction of the offence consummated on its soil." In respect to this very matter the learned author has made his meaning entirely clear in his article on the conflict of laws. 1 Criminal Law Magazine, 695. In putting the case of A in New York shooting B in Connecticut, he says that the place of the consummation of the crime should be regarded as its locality. "Until such consummation a crime, so far as jurisdiction is concerned, is simply an attempt and only punishable as such. It may be indictable for A merely to discharge a gun. It may be said, 'This is a dangerous act, punishable as such'; or it may be said, 'From all the circumstances of the case we infer that you are attempting B's life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime in its completeness exhibits itself."

There being, then, no concurrent jurisdiction at common law, we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in and partly out of the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or State in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." Kerr on Homicide, 226; *Commonwealth* v. *Macloon*, *supra*. It is not very seriously insisted on the part of the State that our statute (*The Code*, §1197) applies to this case, but inasmuch as it was referred to on the argument it is proper that we should briefly examine into its provisions. It provides:

"In all cases of felonious homicide, when the assault shall have been made within this State and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes as if the person assaulted had died within the limits of this State."

This statute has received a judicial construction by this Court in *State* v. *Dunkley*, 3 Ired., 116, and it was held that it did not create any new offence, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited it can hardly be contended that the assault in the present case was committed in this State, and especially is this so when the assault mentioned in the statute evidently means not a mere attempt, but such an injury inflicted in this State which results in death in another State. This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offence, except the death, must have occurred in this State. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction, and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt, if any existed, upon this point by the opinion of Chief Justice RUFFIN in Dunkley's case, *supra.* He says that the act "does not profess to define 'felonious homicide,' or to constitute the crime by any particular acts, but merely says that, in certain cases of felonious homicide, the offender may be indicted and of course tried and punished in the county where the *stroke* was given—meaning, though it does not (like the statute 2 and 3, Edward VI.) expressly say so, 'in the same manner as if the death had happened in the same county *where the stroke was given.*'" As it is plain that in contemplation of law the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the State of North Carolina cannot affect the conclusion we have reached. If, as we have seen, the offence was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offences abroad or on the high seas cannot be asserted by this State. Such jurisdiction does not exist as between the States of the Union under their peculiar relation to each other (Rorer's Interstate Law, 308), and even if it could be rightfully claimed it could not in a case like the present be enforced in the absence of a statute providing that the offence should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a statute (33 Hen. VIII.) appears to have been necessary in order that the Courts of that country could try a murder committed in Lisbon by one British subject upon another. *Rex* v. *Sawyer*, Russell & Ryan Cr. Cases, 294, cited and commented upon in Dunkley's case, *supra*. In *People* v. *Merrill*, 2 Parker's Cr. Cases, 600, it is said that by the common law offences were local and the jurisdiction in such cases depends upon statutory provisions. See also, Wheaton International Law, 115; 1 Wharton Cr. L., 271; 1 Bishop Cr. Law, 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that as to crimes committed by subjects in foreign civilized States, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offences directed against the sovereignty of the prosecuting State; perjury before Consuls and forgery of Government documents being included in this head." To the same effect is 3 Am. and Eng. Enc., 539, in which it is said: "As to offences committed in foreign civilized lands the country of arrest has jurisdiction only of offences distinctively against its sovereignty." See, also, Dr. Wharton's article upon the subject in 1 Criminal Law Magazine,

715. As between the States the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a State can have no extra-territorial force, we are of the opinion that it is competent for the Legislature to determine what acts within the limits of the State shall be deemed criminal, and to provide for their punishment. Certainly, there could be no complaint where all the parties concerned in the homicide are citizens of North Carolina. It may also be observed that in addition to its common law jurisdiction the State of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given we are constrained to say that the prisoners are entitled to a New Trial.

APPENDIX A.

JUDICIAL TERM OF OFFICE.

LETTER OF GOVERNOR CARR.

State of North Carolina,
Executive Department,
March 29, 1894.

To the Honorable Chief Justice and
Associate Justices of the Supreme Court,
Raleigh, N. C.

Sirs:—There exists a difference of opinion in the minds of the citizens of the State in regard to the term of office of a Judge elected by virtue of the provisions of section 25, Article IV of the Constitution. The Attorney General, in an opinion filed at my request in this office, has advised me that every Judge elected under that section is elected for a full term of eight (8) years. A considerable number of able members of the legal profession differ from him in his construction, and contend that a Judge so elected is only elected for the unexpired term of his predecessor in office.

It is all-important that the question should be determined by the highest Court in the State before the election of Judges shall take place in 1894. The importance of having this matter determined will be apparent from section 2689 of *The Code*, which is as follows:

"When the election shall be finished the registrars and judges of election, in the presence of such of the electors as may choose to attend, shall open the boxes and count the ballots, reading aloud the names of the persons who shall appear on each ticket; and if there shall be two or more tickets rolled up together, or any ticket shall contain the names of more persons than such elector has a right to vote for, or shall have a device upon it, in either of these cases such ticket shall not be numbered in taking the ballots, but shall be void, and the counting of votes shall be continued without adjournment until completed, and the result thereof declared."

I am informed by the Attorney General that this section has been construed by the Supreme Court in the case of *Deloatch* v. *Rogers*, 86 N. C. Reports, page 357, to mean that if a ticket contains the names of more persons than the elector has a right to vote for "it is not only inoperative as to the person improperly voted for, but as to all others for whom the elector may vote. The entire ballot for all is vitiated, and must be rejected from the count." This section has not been modified or repealed, and is a part of our present election law. By virtue of its provisions the whole judicial ticket may be void if it should contain more names than the elector has a right to vote for. It will contain more names than the elector has a right to vote for if upon it is printed or written the name of a candidate for the office of Judge when the term of such office will not have expired by January 1, 1895.

It is manifest that this result will occur if the Attorney General's opinion contains a correct construction of section 25, Article IV of the Constitution, and the electors of the State vote for Judges upon a ticket printed or written in accordance with the opposite construction.

In view of the importance of determining the doubt prevailing upon the subject I respectfully request you to indicate what is your construction of the constitutional provisions relating thereto.

I have the honor to be very respectfully yours,

(Signed) ELIAS CARR,
Governor.

LETTER OF CHIEF JUSTICE SHEPHERD AND ASSOCIATE JUSTICES AVERY AND BURWELL.

RALEIGH, N. C., April 3, 1894.

To the Governor:

Your communication of the 29th ultimo, requesting an opinion respecting the term of office of the Judges elected under the provisions of section 25, Article IV of the Constitution, has been received and duly considered by us. We beg to assure your Excellency that we appreciate the importance of the question you have submitted for our consideration, and that we would at once give to it the thorough investigation which its solution would require if we could feel that, in expressing an opinion upon the subject, we were not overstepping the bounds which a proper sense of propriety prescribes for our action. As you are aware, Justices CLARK and MACRAE of this Court, and Judges Armfield, Bynum, Shuford, Whitaker and Boykin of the Superior Court, have rights of property in offices which would be affected by a judicial determination of the question which you ask us to answer, and we find our perplexity increased by the fact that these gentlemen do not join your Excellency in requesting us to examine into the matter and express an opinion thereon. If we could be assured that such is their desire we should feel less embarrassed in coming to a conclusion as to what action we should take in this emergency.

We desire to state that Justices CLARK and MACRAE have deemed it proper that they should abstain from taking any part whatever in this correspondence.

We are, yours very respectfully,

(Signed) JAS. E. SHEPHERD, *Chief Justice.*
" A. C. AVERY, *Associate Justice.*
" ARMISTEAD BURWELL, *Associate Justice.*

The Associate Justices of the Supreme Court and the Judges of the Superior Court whose tenure of office was affected by the question involved joined in a request that the matter should be left to the decision of Chief Justice SHEPHERD and Associate Justices AVERY and BURWELL, and the following reply to the Governor contains

THE OPINION OF THE JUDGES.

RALEIGH, N. C., May 11, 1894.

HON. ELIAS CARR, *Governor of North Carolina,*

DEAR SIR:—The communication from our Associates and the Judges of the Superior Court which has been forwarded by your Excellency to us relieves us of embarrassment in complying with your request, since it is in the nature of a submission of the controversy in reference to their terms of office without a formal action.

The doctrine of *stare decisis* applies with equal force to constructions placed upon constitutions and upon statutes. Where Courts of last resort have placed an interpretation upon either, which adjusts and settles the rights of citizens to offices or any other property, nothing short of the most palpable proof that such precedents are productive of wrong and injustice will warrant a material modification of the principle so settled. Courts are extremely reluctant likewise to disturb or modify any construction that has been given by the Legislature to statutes or provisions of constitutions since their enactment. Where business relations have been heretofore adjusted or rights to offices have been recognized as settled by the legislative sanction so given to a particular construction of doubtful language, Courts are even more averse to disturb or overrule a principle which has been accepted and acted upon by the public, because it had the approval of the law-makers whose power to enact or modify statutes is limited only by the Constitution, and whose interpretation of the organic law is entitled to such profound respect that it will be disturbed by the Courts only on the weightiest considerations. The importance to be attached to the opinion of this co-ordinate department of the Government is greatly enhanced by the fact that the controverted question, which we are called upon to decide, though not one in which we have any direct interest, may, nevertheless, naturally suggest to the public the possibility that it relates so closely to our own positions as to make it difficult to eliminate personal consequences from its consideration. It is of the first importance, not only that justice should be fairly and properly administered, but that its administration should command the confidence of every honest, enlightened and law-abiding citizen.

We are confronted at the threshold of the investigation by the fact that the legal adviser of your Excellency has at your request submitted a well-considered and strong argument upon the one side, while some others of the ablest and most learned members of the legal profession have favored us with powerful presentations of the opposing view. When the scales are so nearly evenly balanced we deem it our own duty to settle the preponderance by casting the legislative view, which is of peculiar weight in this case, into the scale where it belongs. Another consideration which influences us to act upon this view is the fact that, after applying all of the rules devised to aid us in ascertaining the meaning of a constitutional provision, it must be admitted that the science of law is less exact in its application to construction to be placed upon words than to any other subject, since such is the imperfection of human language that law-makers often fail to express their meaning in unequivocal terms, and the interpretation of doubtful expressions of their purpose almost always leads to conflict even amongst the most learned jurists.

The Act of 1876–'77 (*The Code*, §2736) provides how any vacancy, either in the offices of Justices of the Supreme Court or Judges of the Superior Court, among others, shall be filled, when it occurs more than thirty days before a general election. If it did not appear *ex vi termini* that the word "vacancy" was used in the sense of an unexpired term, the repetition of the same word in the very next section, which preceded the provision in reference to the Judges in the original act (section 42, ch. 275, Laws 1876–'77) and followed when both were re-enacted in *The Code* (§2737), tends to show that it was the legislative purpose to fill the vacant place in both instances for the unexpired term.

A reference to the history of our own Courts will show that this was the view of the law which was put into practical operation when vacancies occurred after the passage of the Act of 1876–'77, both by the Legislature and the executive and judicial officers of the State. Justice Dillard was elected in August, 1878, a Justice of the Supreme Court for a term of eight years, the full term of his predecessor having expired. Justice Ruffin was appointed on the 11th February, 1881, to fill the vacancy caused by his resignation, and the Legislature during the same year (ch. 327, sec. 1) provided in express terms for the election of a Justice to fill the vacancy. After the election of Ruffin in 1882 he in turn resigned, and Justice Merrimon was appointed on the 29th of September, 1883, to fill the consequent vacancy. In 1884, Justice Merrimon was elected to fill such vacancy, but, instead of holding for a term of eight years, was re-elected for a full term in 1886. Judge McKoy was elected a Judge of the Superior Court in 1882 for a full term of eight years, but he died in the fall of 1885, and Judge Boykin was appointed to fill the vacancy. Boykin was elected in 1886 to fill the unexpired term of Judge McKoy, which came to an end in 1890; whereupon he was again elected by the people at the very time when the term of his predecessor would have closed but for his death. In the same way Judge Gilmer of the Superior Court was appointed in 1879 to fill the unexpired term of Judge Kerr, which began in 1874, was elected in 1880, and again for a full term in 1882, eight years after the election of his predecessor. It thus appears that the General Assembly gave expression to its construction of the constitutional amendment in 1877, just after it took effect (on the first of January of that year), and both Justices of the Supreme Court and Judges of the Superior Court have been acting, when the question has arisen, upon the idea that the legislative view was correct, while the executive officers, whose duty it has been to send out election blanks and assist in ascertaining the result, and the judges of election and canvassers in the county have never failed to perform their allotted parts in supervising the re-election of an incumbent who had been first elected before the expiration of the term of his predecessor. The more recent cases in which a specific term has been mentioned in the commissions of judicial officers have never been called to the attention of the public till now, nor have they been properly considered executive constructions, since we cannot conceive how the tenure, which depends upon the meaning of the Constitution, can be affected one way or the other by the action of your Excellency or one of your predecessors in unnecessarily incorporating the length of a term in a commission.

While we rest our opinion upon the duty and propriety of adhering to this settled legislative construction, acquiesced in until a very recent period by the people acting in public and private capacities, we deem it not improper to call attention to other clauses in the Constitution and other legislation indirectly bearing upon and harmonizing with our views. In this connection it may be observed that the only explicit provision of the Constitution, as amended in 1875, in reference to the length of the terms of the judicial officers of either Court, is found in section 21, Article IV, which pro- provides that "Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts, *elected at the first election under this amendment*, shall be elected in like manner as Justices of the Supreme Court, and shall hold their offices for eight years." Construed literally and without transposition, this section would fix the terms of only those Judges of the Superior Court first elected thereafter at eight years, and provide for their election by the people of the whole State instead of the voters of the district, leaving us to look elsewhere in the instrument for any provision which fixes the terms of those who should be chosen in after years. The language of section 26, Article IV of the Constitution of 1868 (Bat. Rev., p. 48), was very greatly altered as to the tenure of office of Superior Court Judges. That section provided that "The Judges of the Superior Courts (all, not simply those chosen at the next election) shall be elected in like manner and shall hold their offices for eight years." To say the least, it was very remarkable if this change of phraseology was accidental. If we interpret the amended section according to the ordinary rules of construction, giving to the words, as they are arranged, their natural and obvious meaning, we would be constrained to look elsewhere for some necessary implication which fixed the terms of all the Judges chosen after the election in August, 1868, other than those elected in 1878. Section 33, Article IV of the amended Constitution, provides that the alterations then made (in 1875) "shall not have the effect to vacate any office or term of office now existing." Construing that with other sections of the same Article, such as section 10, which required that the State should be divided into nine Judicial Districts, "for each of which a Judge should be chosen," and sections 11, 16, 22 and 29, we may fairly infer that existing terms of office were not to be disturbed. The status of such Judges was at that time briefly as follows: "Six Judges had been elected in 1874 under the Constitution of 1868, which fixed their terms of office at eight years, extending till 1882, or till the qualification of their successors, January 1, 1883, while section 33, Article IV of the amended Constitution, provided that no such term should be vacated. Though the amendment adopted in 1875 had reduced the aggregate number of Superior Court Judges from twelve to nine, by dispensing with three of the second class elected under the Constitution of 1868 for long terms, there was no express provision fixing the terms of those elected in 1874, and the inference arose that the terms were intended to be fixed as previously provided, thus taking us back by way of reference to ascertain the length of time to the older provisions of the organic law, which prescribed the tenure in connection with the provision for classification as a part of a system. It will be remembered that lots were cast in 1868, as provided by the Convention, to determine which of the Judges of the Superior Courts, then elected, should belong to the class whose terms would expire in 1874, and which to the class whose terms would expire in 1878.

There are many circumstances that point to the legislative construction that these two classes of Judges were to be continued and the terms fixed in that way at eight years, just as it had previously been more plainly provided in the Constitution of 1868. When the General Assembly determined (Laws 1885, ch. 60) to again increase the number to twelve, it was a strange, if an undesigned coincidence, that the terms of the new Judges of the Third, Fourth and Eighth Districts were so arranged as to begin cotemporaneously with those elected for the old Seventh, Eighth and Ninth, or the new Ninth, Tenth and Twelfth, and that thus the whole twelve were again divided into two classes, so that one-half of the whole number would necessarily stand for election every four years, if all should serve for full terms. If there was no general legislative idea that by a fair implication from all of the provisions of the organic law the two classes were to be preserved, and that laws were to be enacted in view of that governing principle, it is not only remarkable that the Act of 1885 should have operated as it did, but more so that the constitutional amendment should add two Justices to the Supreme Court, whose terms would begin on January 1, 1889, two years after the election of the Chief Justice and the other two Associates, so that if the terms, whether filled by one or two incumbents, should be fixed at eight years, we would have two of the officers of that tribunal whose terms would expire on what is known as the Presidential years, and three on the "off years." These coincidences would seem to be explained by attributing to the Legislature the purpose to interpret the amended Constitution, like that of 1868, as providing for two classes of Superior Court Judges, and to extend the classification to the Supreme Court, and not to leave all liable to be removed under the influence of sudden excitement. It should be noted, too, that the Act of 1885 declared that the State should be divided into twelve Judicial Districts, for each of which a Judge and Solicitor should be chosen "in the manner now prescribed by law." What law? The Act of 1876–'77, which had already been re-enacted in *The Code* and was now again recognized by the Legislature. These considerations lend additional strength, if indeed any were necessary, to our conclusion that it was the plain purpose of the Legislature to construe section 25 of Article IV of the Constitution so as to insure the election of Justices and Judges of the Supreme and Superior Courts for full terms only at regularly recurring intervals of eight years. Such being the view we have adopted after mature deliberation, we deem it unnecessary to enter into an elaborate discussion of the meaning of the language used in section 25, Article IV of the Constitution. While we are inclined, according to our interpretation of the terms employed in that section, to so construe their actual meaning as to harmonize with our view of the legislative construction, we prefer to concede that the very able argument of the Attorney General has raised a doubt in our minds as to the meaning of the words, considered from the action of other branches of the Government. Conceding, then, that the particular language leaves the intention of the framers of the Constitution uncertain, we prefer to rest our opinion upon the idea that our doubts should be resolved in favor of the legislative construction, with the universal acquiescence in it by the people, as also upon the ground that in the effort to fix the terms we are compelled to consider, as *in pari materia*, other provisions of the Constitution and bring them into accord with the section relating more specifically to the question before us.

It is not improper to add that it is considered a safe and sound rule of construction that when "the duration of a term of office which is filled by popular election is in doubt or uncertainty the interpretation is to be followed which limits it to the shortest time, and returns to the people at the earliest period the power and authority to refill it."

(Signed) JAS. E. SHEPHERD,
Chief Justice.

(Signed) A. C. AVERY,
Associate Justice.

(Signed) ARMISTEAD BURWELL,
Associate Justice.

APPENDIX B.

PORTRAIT OF CHIEF JUSTICE MERRIMON.

PRESENTED TO THE SUPREME COURT ON MARCH 27, 1894.

Mr. ARMISTEAD JONES, addressing the Court, said:

The family of the late lamented Chief Justice MERRIMON have honored me by requesting that I should present to the Supreme Court of North Carolina this life-like portrait of that distinguished jurist. It is with melancholy pleasure that I enter upon the task assigned me. When a great and wise man dies the void should be filled by a constant recurrence to his virtues. Though his body has returned to the dust whence it came, he should ever live in our minds and hearts, and we should feel his inspiring impress in the walks of life. This thought emboldens me to endeavor to delineate summarily the life and character of this great man.

As an educator of public thought, Chief Justice MERRIMON was the peer of any man in his State. He was original, and bold in his originality. He led in the paths of truth, and wherever he led it was always safe to follow. Whether at the bar or on the hustings, he was ever the same dignified gentleman, possessing the courage of his convictions and urging them with an intensity that eliminated truth from error as the gold is separated from the dross. It was one of his distinctive characteristics to master thoroughly anything he undertook, and hence his utterances were always pleasant and instructive. With his pure and undefiled character, mingled with a stern sense of justice to his fellow-man, he wielded an influence of good to his country that posterity will cherish and sacredly remember.

AUGUSTUS SUMMERFIELD MERRIMON was born in that part of Buncombe county now constituting the county of Transylvania, on the 15th day of September, 1830, and was at the time of his death sixty-two years of age. His father was the late Branch H. Merrimon, a devout minister of the Methodist Episcopal Church, South, and his mother was Mary Paxton, a lineal descendant of the McDowells of Revolutionary fame. Soon after the marriage of his parents they moved to Henderson county, and there his father devoted himself in great measure to agricultural pursuits; and upon the farm, with all the natural advantages a rural life could afford, the son began to acquire those noble traits that adorned his life.

The limited means of his father admitted of but few advantages of a scholastic education, and while following his daily avocations the first light of learning dawned upon him. One of the proudest recollections of his life was to recall the fact that he acquired the rudiments of an education while following the plow, and he often would point with pride to a worn copy of Towns Analysis in his library as if it was his *Alma Mater*. Recognizing the deep interest manifested by him in trying to educate himself, his father finally sent him to the school of Mr. James Norwood, a teacher of merit at Asheville, and there by studious endeavors he soon became one of the foremost in that school. His efforts were mainly directed towards mastering the English branches, and so well did he succeed that in a short time he felt that he was prepared to enter the University but had not the means to defray his expenses. Desiring to enter the legal profession, he began the study of the law, and for this purpose devoted himself untiringly, and at the same time gave much attention to historical study. In about a year he applied for and obtained license to practice in the County Courts of the State, and by diligent labor and zeal in another year he was admitted to practice in the Superior and Supreme Courts. It was, indeed, entertaining and instructive to hear him detail his early experiences at the bar. He was so exact and punctilious in his conduct, and so frank and open in his dealings, that in a short period of time he began to attract the attention of men of affairs, and, as he grew in experience, his practice at the bar increased also. Here in his native county he laid that broad foundation upon which he so proudly stood through life.

The first position held by him was that of County Attorney for Buncombe, and to this he brought a mind quick to grasp the questions involved in the duties of his office. It was at once apparent that he possessed the elements necessary for a prosecuting officer, and the vigor with which he conducted the State's cases, and the fairness exhibited by him in all of his intercourse with the Court, the bar and the jury, soon marked him as a man of no ordinary ability. In a little while the people of his county began to regard him as a leader, which naturally induced him to devote some attention to political matters. In 1860 he was elected to the House of Commons, where he served with great credit to himself, making a reputation in that body, composed of some of the ablest men of the State, which soon made him one of the foremost leaders of the political party to which he belonged. He strongly opposed secession, but when it became inevitable, recognizing the sovereignty of the State, he was one of the first to volunteer in its defence. He received the appointment of Commissary, with the rank as Captain, in the Confederate Army, and served in that capacity until his appointment as Solicitor for the Mountain District. At this time the war was well under way, and owing to the rugged, mountainous section of the west it was infested with bands of wrong-doers, men who sought to take advantage of the turbulent times, many of them being deserters from both the Confederate and Federal Armies. Crimes were committed against the public peace, and the high-handed conduct of offenders was appalling. It was at times dangerous to attempt to bring these ruffians to justice and, in order to protect the law-abiding, nerve and boldness were required. These essential prerequisites were not found wanting in the prosecutor for the State. His love of law and order was the incentive to duty, which was performed in such a fearless manner as to bring to justice many of those bad men, and to strike down the efforts of others to demoralize and destroy the community. Such was his success in restoring the supremacy of law that the first Legislature after the war elected him Judge of the Superior Court for that Judicial District—a deserved recognition of duty well performed. His course while presiding as Judge of the Superior Court forms an interesting part of the history of this State. The war had closed, leaving civil government wrecked and society demoralized. Many of the best men of the State were under the ban. Marauders infested the west and were a terror to society. In some of the counties they had full sway. The Courts must be opened and civil supremacy restored. Judge MERRIMON mastered the difficulties. Courts were reorganized and held in those counties and society redeemed. His quickness of perception was one of his most striking characteristics; this, coupled with a sound knowledge of the law, enabled him to preside with ease and dignity. Exact as he was, his main care was for the logic of the question, to an understanding of which all of his energies were bent.

When the military authority in the days of reconstruction came in conflict with the civil, and the Congress of the United States assumed to dictate the conditions upon which the States should return to the Union, and the order of the military commander became the rule of action, Judge MERRIMON, appreciating the helplessness of statal power, refused to bend to arbitrary orders, and tendered his resignation, which the Governor declined to accept until the trial by him of one of the most celebrated cases in the annals of our State, the Johnston Will case, involving the settlement of intricate questions upon which depended the disposition of vast property. The ablest counsel of that time appeared in this case, and the trial extended over a period of six weeks. Many exceptions were taken in the course of the trial, but none were sustained in the Supreme Court upon appeal.

Returning to the practice of his profession, he soon found a wider field for action by taking up his residence in the city of Raleigh. Here he formed a copartnership with the Hon. Samuel F. Phillips, which continued until sometime in 1873. During that period the firm of Phillips & Merrimon appeared of counsel in the most important litigation in the various Courts, and at a time when legislation was prescribing new forms of procedure under a constitution that effected radical changes in rights and remedies. In many instances, with no guide save that of reasoning from first principles, Judge MERRIMON by the force of logic opened the way in which others have since followed, by establishing the precedent of the Court. As a speaker there was little flourish or flower in his discourse, and well-rounded rhetoric gave way to the essence of the point at issue. Notwithstanding his large practice at the bar he spared the time to advise and counsel with his people upon public affairs. His voice was constantly raised in defence of civil liberty, and his energies directed towards checking the usurpations of the political party then in control of the State and Federal Governments, when it became a part of the policy of that party to foist upon the South the reconstruction amendments to the Constitution, which placed under disability many of the best class, and extended to the ignorant and incapable the power of control, and when in order to successfully execute that policy the writ of *habeas corpus* was suspended and martial law declared in certain counties of the State, and men were arrested and imprisoned by a *quasi*-military authority, one of the first to come to the rescue was Judge MERRIMON. His talents were devoted towards sustaining the law of his fathers and upholding the principles of civil liberty that were so near to his heart. He was one of the first to apply for writs of *habeas corpus*, and to appeal to the judiciary, and finally he was largely instrumental in procuring the release of the persecuted by order of Judge Brooks. However the power of that Judge may be questioned, his order cut the Gordian knot and the people were freed. In the campaign of 1870, Judge MERRIMON canvassed for the Democratic party, and after the overthrow of the party in power at the election of that year the Governor of the State was impeached for high crimes and misdemeanors, and Judge MERRIMON was engaged by the State as one of the counsel for the managers appointed by the House of Representatives. History records the result of that impeachment and the important part taken by him in its management.

In 1872, Judge MERRIMON was nominated by the Democratic party for the office of Governor of the State, and, though the whole power of the Federal Government was brought to bear to compass his defeat, he came within a few hundred votes of being elected. Though defeated by influences beyond the power of human energy to control, he so wounded and crippled his adversaries as to produce their defeat at the next election.

The Legislature of 1872–'73 elected him to the United States Senate, where he served for one term. In the same year his law partner, Mr. Phillips, became the Solicitor General of the United States, and hence the law firm was dissolved. In the following year he became the partner of Colonel T. C. Fuller, now a Judge of one of the Federal Courts, and Captain S. A. Ashe, under the firm name of Merrimon, Fuller & Ashe. This continued until Captain Ashe retired to enter other pursuits, and thereafter the firm of Merrimon & Fuller continued until near the time when Judge MERRIMON was appointed by the Governor in 1883 to fill a vacancy upon the Supreme Court Bench. In the Senate of the United States he at once showed that he was a ready debater, well equipped to cope with the great men of that day, and soon acquired a reputation in that body that was an honor to himself and his State. He participated in many of the great debates and exhibited a familiarity with the questions involved to a remarkable degree. He saw that the currency of the country should be expanded to meet its business needs, and greatly aided in carrying through Congress a bill to increase its volume and make it more flexible, which was vetoed by the President.

Upon the death of Chief Justice SMITH the Governor appointed Judge MERRIMON to fill the vacancy as Chief Justice of the State, and at the next election he was indorsed by a large majority at the polls. While upon the Supreme Court Bench much of his attention was given to settling the practice under *The Code*, and he was specially fitted for this work. He cleared away the uncertainty that enveloped points of practice, construing the statute in a plain and concise way, so as to have it express its true meaning. His opinions, beginning with the 89th volume of our Reports and extending through the 109th volume, abound with such force and learning as will ever mark him as one of the greatest and purest Judges of modern times. He was broad, and at the same time possessed a power of concentration that enabled him to discern the true principle and deal with it at ease.

He was a bold, just Judge, fearless of consequences when he believed he was right. He at no time stooped to popular prejudice or opinion, and sustained through life a spotless name. While upon the Bench he scorned the idea of being influenced by outside popular feeling and had the courage and manhood to give his opinion of the law as he in conscience understood it.

In 1852, Judge MERRIMON married Margaret J. Baird, daughter of Israel Baird, of Buncombe, a member of a large and influential family, and she with seven children, all well conditioned in life, survive him.

He was a great lover of home and all its domestic surroundings, an affectionate and devoted husband and father. What was more natural than that this man whose life-work had been spent in following precedents, in establishing highways through the intricacies of legal questions, in the support and maintenance of those principles of human conduct that the experience of the best and wisest of men has determined to be most durable and most worthy, and who illustrated by his own ways that the most exalted plane of highest virtue was his constant aim, should be found at the last with his eyes fixed upon Him who is the fountain and source of all law, of all things which are for the best of mankind?

Yes, the closing scenes of his life gave evidence, trumpet-tongued, that he who loved truth in law here shall stand forever blessed in the presence of Him who is the great lawgiver and maker.

His belief and his mode of living here were in the eternal fatherhood of God and the boundless brotherhood of man. In the world above, where the reign of law is supreme and without infringement, shall this just man live forever.

Chief Justice Shepherd, responding for the Court, said:

Soon after the death of Chief Justice Merrimon the members of the bar presented appropriate resolutions in commemoration of his life and character, and these were accompanied with addresses by his professional brethren emphasizing in terms of impressive eloquence his eminent virtues as a man and as a Judge. The Court in directing the resolutions to be spread upon its records expressed its hearty concurrence in all that was said touching the lofty character and intellectual power of our lamented friend and brother. It is in the same spirit that we have listened to the remarks of Mr. Jones on the present occasion, and we desire to express our gratification at having on the walls of this chamber the almost life-like reproduction of the lineaments of one with whom we were so long associated in our judicial labors, and whose loss we so deeply deplore. We shall never look upon his manly features without being reminded of his exalted conceptions of judicial position and of that courageous spirit which, scorning the timidity of the time-server, bade him discharge its sacred duties without "fear or favor" and regardless of all personal consequences. He applied his best energies to every task that lay before him, and from the very commencement of the study of the law to the end of his days he sought the support and guidance of that Power which can only emanate from the Divine Author of all things. These two great principles formed the basis upon which his noble character and great success were founded, and this is strikingly manifested by the following language of his diary written on December 5, 1850, which is extracted for the benefit of the youth of our land, who are just assuming the responsible duties of life: "To-day I commenced the study that I presume will be ended only with my life. I have just entered upon the study of the law. Whether I shall succeed or not, none but God knows, and in Him I put all my trust, for it is from Him that all things come. One thing, however, is certain: no labor nor pains shall be wanting on my part to make myself both useful and respectable."

It is not often that we find the resolutions of youth so ardently pursued and so richly rewarded, nor do we often meet with a life so beautifully rounded as to afford such an inspiring example of all that is good in the private citizen or in the public official.

Chief Justice Merrimon was a wise, conservative and fearless Judge and an upright and patriotic statesman, and as such we revere his memory.

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ABANDONMENT OF CONTRACT:

Where one party to a contract relies upon a renunciation of it by the other the burden is upon him to show by positive and unequivocal proof not only that the other party abandoned the contract but that he himself accepted the renunciation. *Sitterding* v. *Grizzard*, 108.

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ABUTTING PROPRIETOR, Rights of in street, 392.

ACCOUNT STATED:

Where plaintiffs and defendant had mutual running accounts and the former took up certain outstanding secured notes of the latter at various times (which were marked paid by the payees) and rendered stated accounts to the defendant showing that the amounts paid out in taking up the notes had been charged up to him, just as other items were charged: *Held*, that, in the absence of fraud or mistake, the cancellation of the notes, the rendition of the accounts and the tacit assent thereto by the debtor made the balance stated the true debt between the parties and the notes could not be revived as obligations for the payment of money without the consent of the maker, and such consent could not be presumed from the fact that he did not make any objections to an account subsequently rendered, in which the plaintiffs had separated the items of the note payments from the other items of their mutual dealings. *Wallace* v. *Grizzard*, 488.

ACCOUNTING, RIGHT TO:

1. Where plaintiff consigned to defendants a stock of goods, the latter to conduct the business in the name of the former and to account to plaintiff for all proceeds, and plaintiff brought action of claim and delivery: *Held*, that the denial, in defendants' answer, of plaintiff's ownership was a repudiation of the contract and rendered it unnecessary for plaintiff to prove a demand for an accounting and a refusal before bringing action. *Woolen Co.* v. *McKinnon*, 661.
2. In claim and delivery by the owner of a stock of goods under a contract with defendants entitling the latter to retain possession and to be revested with the title whenever the net profits paid

to the owner should amount to $750, the defendants are entitled to an accounting to ascertain the amount of net profits paid over so that the owner may be charged with the same in adjusting the rights of the parties. *Ibid.*

ACTION FOR ACCOUNT:

Where a surviving partner of a firm conveyed to "C., administrator" of the deceased partner, the assets of the firm to enable the said "C., administrator, to pay off all the debts and liabilities of the deceased partner, including the debts of the said firm, and to legally account for all such moneys as may come into his hand by virtue of this assignment": *Held*, that the assignor (the surviving partner) is entitled to bring suit against C. individually for an accounting of his trusteeship. *Weisel* v. *Cobb*, 22.

ACTION FOR ACCOUNT AND INJUNCTION:

Where a purchaser of land executed a trust deed to secure the purchase-money under which the trustee advertised the land for sale, and F. brought an action to restrain the sale and for an accounting, alleging in his complaint that there was a parol trust in the land whereby he became the owner of the equity of redemption therein, and claiming that the notes were entitled to credits other than had been given, and his averments were corroborated by affidavits but denied by the answer of defendant and affidavits in support thereof: *Held*, that the Court properly granted an interlocutory injunction. *Faison* v. *Hardy*, 58.

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ACTION ON ACCOUNTS:

One who has an account against another consisting of several distinct items based on separate transactions may bring an action upon each distinct and separate item, provided that if he should bring more actions than are necessary to avail himself of the jurisdiction of a Justice of the Peace the Court may, to prevent oppression and unnecessary costs, require a consolidation of the actions; but if, before action brought, the plaintiff renders a statement covering all the items contracted at different dates, to which no objection is made by the debtor within a reasonable time, the account becomes an account stated and cannot be then split up. *Simpson* v. *Elwood*, 528.

ACTION FOR DAMAGES, 203, 234, 440, 621, 692, 697, 699, 718, 728:

Where one in consequence of a mistake in the transmission of a telegraphic message was induced to sell property at a less price than he could thereafter have sold it for, but did receive its then market value, he suffered no damage for which an action will lie beyond the cost of the telegram. *Hughes* v. *Western Union Telegraph Co.*, 70.

ACTION FOR UNLIQUIDATED DAMAGES:

Service of process by publication based on an attachment issued in an action for unliquidated damages is invalid except in cases specified in *The Code*, §347, and amendatory act, ch. 77, Acts 1893. *Mullen* v. *Canal Co.*, 8.

ACTION FOR MALICIOUS PROSECUTION:

An action will not lie for malicious prosecution, in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law or their equivalent in equity, or other circumstances of special damage. *Terry* v. *Davis*, 31.

ACTION FOR SPECIFIC PERFORMANCE:

Where one contracts for the purchase of land without any agreement for a warranty of title and, thereafter and before the execution of a deed, encumbrances are discovered, he cannot be compelled to take the defective title or to pay the bonds given for the price of the land, for an agreement to take a deed without warranty is not a waiver of the right to demand a clear title. *Leach* v. *Johnson*, 87.

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An action brought in one county to correct a judgment rendered in another cannot be treated as a motion in the cause. *Rosenthal* v. *Roberson*, 594.

ACTION TO ENFORCE CHARGE on separate estate of married woman, 613.

ACTION TO RECOVER PROPERTY:

1. The owner of a building on another's land cannot recover damages for withholding possession without first making a demand and being refused permission to enter and remove it. *Eastman* v. *Commissioners*, 524.
2. The owner of a building on another's land cannot recover, as damages for its detention, the rental value thereof, but only the actual damages suffered by such detention. *Ibid.*

ACTION TO RECOVER LAND, 76, 532, 640, 643, 649:

1. Positive proof of the location of a corner called for in a grant will control course and distance, but where the evidence leaves in doubt the actual site of the corner it is the duty of the jury to be guided by what is, in that event, the more certain description—the course and distance. *Boomer* v. *Gibbs*, 76.
2. The test of the sufficiency of possession of land to mature title is the liability of the occupant to an action of trespass in ejectment. *Ibid.*
3. Where the boundaries of two grants or deeds lap upon each other the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage. *Ibid.*
4. Possession of part of the lappage by the one having the inferior title gives constructive possession of the whole lappage so long as the one having the better title has not actual possession of any part. *Ibid.*
5. Where the complaint in an action to recover land alleges title and right of possession in the plantiff, proof that plaintiff is the owner of the equity of redemption in the land will permit a recovery as against a mere trespasser. *Arrington* v. *Arrington*, 116.
6. In an action to recover land the plaintiff must have the right to the possession not only at the institution of the suit but at the time of the trial also; hence, in the trial of such an action, where it appeared that the plaintiff had at the commencement of the action only an equity of redemption in the land, it was error to exclude testimony tending to show that between the commencement of the action and the trial the plaintiff had lost her equitable title. *Ibid.*
7. In the trial of an action it is the duty of the Judge to submit such issues arising on the pleadings as will present the whole matter in controversy and allow the introduction of all material evidence, and on the responses to which the Court will be able to pronounce judgment on the merits. *Allen* v. *Allen*, 121.
8. Where, in an action for the recovery of land, the answer of the defendants set up equities on which substantial relief was demanded, and the plaintiff, in his reply, admitted a contract between himself and defendant's intestate for a sale of the land to the latter, and an interchange of a bond for the purchase-money and a bond for title, and averred his willingness to make title upon the payment of the bond for the purchase-money,

which defendants alleged had been paid in full: *Held*, that it was not error to refuse to submit issues tendered by the plaintiff having no reference to the equities set up, but the Court properly submitted such as directed the attention of the jury to the question whether the purchase-money had been paid in full or in part. *Ibid.*

9. Where, under section 484 of *The Code*, the plaintiffs in an action of ejectment elect to accept the valuation of the land fixed by the jury and the defendants satisfy the judgment, the effect of such satisfaction is to evict the defendants as heirs of an ancestor under whom they claimed and immediately to invest them with the title as purchasers from the plaintiffs and they thereafter do not hold as heirs of their ancestor. *Carter* v. *Long*, 187.

10. In such case the defendants, having been evicted as claimants under their ancestor, may recover on the broken general covenant of warranty which a grantor had made to such ancestor and his heirs. *Ibid.*

11. Where there have been a conveyance and reconveyance of land with covenants of warranty, in order that they may cancel each other they must be *like* covenants; therefore, where C. conveyed to S. with *special* warranty and S. reconveyed to C. with general warranty the covenants do not mutually cancel each other, and, upon eviction by a stranger under a paramount title, C. or his heirs may recover damages for the breach from S. or his heirs. *Ibid.*

12. Where the only interest a *feme covert* has in land is her contingent right of dower, the grantee of herself and husband may recover possession although she was not privily examined as to the conveyance. *Deans* v. *Pate*, 194.

13. In an action for the recovery of land the complaint, instead of being general, as usual, alleged that the defendant entered into possession under a contract of purchase with plaintiff's ancestor and, therefore, as his tenant, but never complied with the terms of the purchase; and the defendant answered that his father entered under a contract of purchase with plaintiff's ancestor and paid the purchase-money, and that, after the death of defendant's father, the plaintiff's ancestor fraudulently procured the defendant, in ignorance that the land had been paid for, to make a new contract of purchase; the plaintiff replied, denying that the purchase-money had been paid, as alleged in the answer, and denying the allegation of fraud, but did not plead that defendant was estopped to deny that he was plaintiff's tenant by reason of defendant's occupation of the land under the contract of purchase: *Held*, that the Court properly submitted the

single issue as to the controverted fact whether defendant's father had paid for the land. *Wilkins* v. *Suttles*, 550.

14. Where the defendant, in an action to recover land, sets up a counter-claim for substantive relief the plaintiff is not entitled to take a nonsuit. *Ibid.*

15. The legal title of lands passes by a mortgage to the mortgagee, who may maintain an action to recover possession of the same after default. *Kiser* v. *Combs*, 640.

16. When the plaintiff is entitled to recover in any view of the testimony, error in giving instructions in his favor is harmless and not ground for reversal of the judgment. *Ibid.*

17. In an action to recover land a defendant who went into possession under the plaintiff's grantor, as his agent, is estopped to deny plaintiff's title. *Cooper* v. *Axley*, 643.

ACTION TO SUBJECT LANDS TO PAYMENT OF DECEDENT'S DEBTS:

1. Though a greater particularity is required when one of several parcels or a part of a single parcel of land is the subject of the litigation, yet, where the entire real estate of a decedent is, in the absence of personal assets, liable to be charged with the payment of his indebtedness and the plain object of the action is to subject the same, a purchaser will be affected with constructive notice as to any land situated in the county in which the action is pending, especially where the summons includes the devisees of the decedent and the complaint alleges that at the time of his death the decedent was seized and possessed of a large quantity of real and personal property which went into the hands of his executors, and that his children, named in the summons and complaint, are his devisees and legatees and each entitled to an equal share of *said estate*. *Arrington* v. *Arrington*, 151.

2. A judgment against the executors of a decedent simply ascertaining the amount of the indebtedness and not being a lien upon his lands is not constructive notice of the insolvency of the estate, and a *bona fide* purchaser, for value, of land from the devisees, after two years from the grant of letters, not having *actual* notice of the judgment or of the insolvency of the estate, will be protected. *Ibid.*

3. One who, with actual notice of the insolvency of the decedent's estate, purchased land from another, who, with like notice, had bought from the devisee, is not protected by section 1442 of *The Code*, but the land may be subjected to the payment of the indebtedness of the estate. *Ibid.*

4. One who, in good faith, purchases property upon credit at a fair price from an insolvent debtor is a purchaser for value; therefore, one who, after two years from the grant of letters, for value and without notice of fraud in the devisee, purchases land from the latter and at once reconveys it as security for the purchase-money, is a purchaser for value and protected by section 1442 of *The Code* against creditors of an insolvent estate. *Ibid.*

5. One who, with actual notice of the insolvency of an estate, purchases land from one who, without such notice, bought from a devisee after two years from the grant of letters, will be protected by his vendor's want of notice. *Ibid.*

6. T., after two years from the grant of letters on decedent's estate and during the pendency of a suit to subject the land to the payment of his debts, purchased the land from a devisee, and thereafter, and after the breaking of the *lis pendens*, sold to R., who had no constructive notice of the pendency of such action or actual notice of the insolvency of the estate; an attorney, to whom no fee or general retainer was paid, but with whom R. consulted, had actual notice of the insolvency of the estate, but did not communicate it to R., and did not act as the agent of R. in the purchase of the land: *Held*, that R. was a *bona fide* purchaser for value and is not chargeable with such attorney's knowledge otherwise and previously obtained of the former *lis pendens* and the insolvency of the estate. *Ibid.*

7. The fact that a partition of lands has been made among devisees does not estop a legatee from enforcing his claim against the land, except as against purchasers in good faith for value and without notice. *Ibid.*

ADMINISTRATION:

A dispute as to the title to property alleged, in application for letters of administration, to belong to the decedent is not such an issue of fact as is required by section 1382 of *The Code* to be transferred to the Superior Court for trial. *In re Tapp's Estate*, 248.

ADMINISTRATOR, 474:

1. Section 164 of *The Code*, allowing the personal representative of a decedent to sue, does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. *Hughes* v. *Boone*, 54.

2. Section 168 of *The Code*, which suspends the statute of limitations during the pendency of a contest over the probate of a will, applies only where there is no administrator or collector during the contest. *Ibid.*

3. Where an administrator, before the settlement of the estate, pledged a note belonging to his intestate's estate as collateral security for his individual debt, the transferee having full notice of its character at the time it was transferred, an administrator *de bonis non* of the estate may recover the note from the transferee. *Hendrick* v. *Gidney*, 543.

4. In such case the fact that the former administrator, at the time he made the misappropriation, was a creditor and distributee of the estate cannot affect the right of the administrator *de bonis non* to administer upon all the personal property not already administered. *Ibid.*

5. On March 18, 1876, a judgment was docketed against G. and a homestead allotted on July 31, 1876; she conveyed it to H. December 29, 1881, and died June 2, 1891: *Held*, in a proceeding by G.'s administrator to sell the land for assets to pay the judgment, that the lien of the judgment continued so as to be a charge upon the land and that the administrator was entitled to sell it to pay the judgment and costs of its enforcement. *Blythe* v. *Gash*, 659.

ADMINISTRATOR'S SALE OF LAND:

An allegation that "the administrators, in the administration of the estate of deceased, sold certain lands and assigned the certificate of survey," is not a sufficient averment of a sale under lawful authority, but in an action to recover such lands such insufficiency is cured by the allegation that the administrator obtained judgment on the notes given for the purchase of such lands and had the same sold under execution, for, in such case, the law presumes that the Court acted properly in rendering the judgment and will not permit it, or the sale made under it, to be attacked in an indirect and collateral way. *Wilson* v. *Dewreese*, 653.

ADVANCES TO TENANTS:

Although, under sections 1754, 1799 and 1800 of *The Code*, the lien of the landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard* v. *Johnson*, 141.

ADVERSE POSSESSION:

1. In an action by a junior grantee against a senior grantee to recover possession of land included in both grants by reason of a lappage, it appeared that plaintiff and his predecessors were in possession of a portion of the lappage for more than seven years

before defendant entered on, and actually occupied, another portion of it; the only evidence of any attempt by defendant to exercise dominion over the lappage before such entry was that her tenants entered at intervals and cut timber for rails and removed pine straw from it: *Held*, that it was error to submit to the jury the question as to whether defendant, during such seven years, occupied and used any portion of the lappage "for any purpose such land could be used for," it not having been shown that the land was unfit for cultivation and had been used for the statutory period for the only purpose for which it was available. *McLean* v. *Smith*, 356.

2. Though it is not necessary to show continuous and unceasing possession of land for the statutory period of twenty-one years in order to raise a presumption of a grant from the State, but only that in the aggregate the actual possession has extended over such period, yet, where written evidence of title is offered as color merely, the possession must be manifested by unequivocal acts of ownership such as would have subjected the occupant not simply to an action of trespass *quære clausum fregit*, but to a possessory action at common law. *Hamilton* v. *Icard*, 532.

3. Though one has color of title to land he acquires title by adverse possession to none by planting some part of it in tobacco every year for more than the statutory period, no part being planted for more than two years, and each part being inclosed only for the time it is cultivated. *Ibid.*

4. Though plaintiff in an action for land fails to show a grant from the State, or adverse possession for sufficient time to bar the State, he may avail himself of the subsequent introduction by defendant of a patent to prove adverse possession for such period as will bar defendant. *Ibid.*

5. The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State (*The Code*, §139, subd. 2)—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. *Ibid.*

6. Under *The Code*, §141, providing that no action shall be had against one who has been in possession of land, under color of title, for seven years, by one having right or title thereto, except during the seven years next after his right or title shall have descended or accrued, the statute begins to run against one to whom a grant of the land has been made only from the time of the grant. *Ibid.*

AFFRAY:

Where, on trial for an affray, the defendant admitted that he used a deadly weapon, the question of reasonable doubt as to his guilt was eliminated and the burden of showing matter of mitigation, excuse or justification to the satisfaction of the jury was thrown upon the prisoner. *State* v. *Barringer*, 840.

AGENCY:

1. An attorney holding a note for collection has, *prima facie*, no authority to indorse it in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. *Sherrill* v. *Clothing Co.*, 436.
2. Acquiescence by a client who supposed that his attorney had merely sold a note does not constitute a ratification of an unauthorized indorsement of the same. *Ibid.*

AGENT:

In an action to recover land a defendant who went into possession under the plaintiff's grantor, as his agent, is estopped to deny plaintiff's title. *Cooper* v. *Axley*, 643.

AGRICULTURAL LIEN:

1. Although under sections 1754, 1799 and 1800 of *The Code* the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard* v. *Johnson*, 141.
2. Advances made to a mortgagor in possession to aid in cultivation of a crop up to the time of sequestration of the crop by the appointment of a receiver, will not be subordinated to the mortgage indebtedness. *Carr* v. *Dail*, 284.

ALIENATION, POWER OF CESTUI QUE TRUST TO SELL WITHOUT CONSENT OF TRUSTEE, 590.

AMENDMENT:

1. A Clerk having jurisdiction of a petition for partition, the transfer thereof to term for trial of issues raised by the pleadings transferred the jurisdiction to the Judge, and his denial of a motion for leave to amend the petition upon the ground that he had no power to grant it was error. *Godwin* v. *Early*, 11.
2. In an action by the parties injured by the breach of an official bond it was not error to allow the summons to be amended, after the pleadings were filed, by the insertion of the words "the State on the relation of." *Forte* v. *Boone*, 176.

3. While Courts have an inherent power to correct their records so as to make them speak the truth, this principle does not apply when the order sought to be amended has been construed and affirmed by this Court and contains the exact language of the Judge by whom it was dictated and signed, the ground upon which amendment is sought being that the language used by the Judge and the construction put upon it by this Court did not convey the true meaning of such Judge. *Harrison* v. *Harrison*, 219.

4. The Court has power to permit amendment of an affidavit in attachment proceedings which was insufficient as failing to state how the debt arose, and from an order granting such amendment no appeal lies. An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the attachment. *Cook* v. *Mining Company*, 617.

ANCILLARY PROCEEDINGS, 470:

Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto. *Allison* v. *Maddrey*, 421.

APPEAL:

1. Where appellant's counsel, five days after the adjournment of Court, mailed by registered letter notice of appeal, statement of case, and copies and fees to the Sheriff of the county at the county-seat, so as to leave ample time for service on appellee's counsel, who resided at that place, the failure of the Sheriff to take the notice, etc., from the post-office until after the ten days allowed for service cannot be imputed to the appellant as his laches. *Arrington* v. *Arrington*, 113.

2. Where appellant's case on appeal was served within the time prescribed on the appellee, who thereupon mailed his counter-case, with fees, to the Sheriff of the county where appellant's counsel resided, and the Sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post-office until too late, no laches can be imputed to the appellee. *Arrington* v. *Arrington*, 115.

3. Where appellant's failure to send appellee's counter-case to the Judge to settle was caused by the fact that it was served too late the case will be remanded to the Judge for settlement. *Ibid.*

4. Failure to serve a case on appeal on appellee legally and in due time cannot be cured by the action of the Judge below in thereafter settling the case. *Forte* v. *Boone*, 176.

5. Where there is no valid case on appeal and no error appears on the face of the record the judgment below will be affirmed. *Ibid.*

6. Where no case on appeal accompanies the record and no error is apparent on the face of the latter the judgment below will be affirmed. *Maggett* v. *Roberts*, 227.

7. An appeal not docketed before the close of the call of the District to which it belonged at the Term of this Court next succeeding the trial or (upon failure of appellee to move to dismiss under Rule 17) during the Term, will be dismissed, on motion, if docketed at the Term following that at which it should have been docketed. *Graham* v. *Edwards*, 228.

8. An alleged verbal agreement between counsel that an appeal not docketed at the proper time should go over to the next Term will not be considered if denied by the appellee. (Reiterated suggestions of the Court as to the necessity and propriety of having all agreements between counsel reduced to writing or noted in the minutes of the Court). *Ibid.*

9. Where the Clerk of the Court below delays to send transcript of record in time to docket the appeal a *certiorari* should be applied for by the appellant at the Term next succeeding the trial below, but after the expiration of such Term a *certiorari* will not issue. *Ibid.*

10. An appeal lies from an order vacating an order of arrest. *Fertilizer Co.* v. *Grubbs*, 470.

11. Where a motion was made to set aside a decree of sale and, adversely, a motion to confirm the report of sale and for final judgment was made, the latter was allowed and the former continued, but no appeal was taken from the final decree, the Judge at the next term properly held it to be unnecessary to consider the motion to set aside the former decree. *Rice* v. *Guthrie*, 589.

12. Where the record in this Court consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a *certiorari*, nor that the case be remanded, the appeal will be dismissed. *Ibid.*

13. Where an appeal was dismissed because not docketed before the perusal of the district to which it belongs, as provided in Rule 17, and appellant moved to re-instate on the allegation that he had directed the Clerk to send up the transcript and paid the fees therefor in advance, the motion will be denied, for, although

such allegation would have been a sufficient answer to the motion to dismiss if affidavit had been filed to such effect and a *certiorari* applied for, yet it was laches not to interpose such affidavit and show excuse for the failure. *Paine* v. *Cureton*, 606.

14. The discretion vested in this Court by ch. 135, Acts of 1889, to permit an appeal bond to be filed here will not be exercised unless reasonable excuse be shown for the failure of appellant to file it below. *Jones* v. *Asheville*, 620.

15. No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days' notice required, for a motion to dismiss, by ch. 121, Acts 1887, applies only when there is an irregularity in the bond or in the justification of sureties. *Ibid.*

16. Where an appellant, without whose default the case on appeal was not settled by the Judge, failed to docket the transcript of the record at the next succeeding term of this Court, but applied at such term for a *certiorari*, the writ will not be allowed. *State* v. *Freeman*, 872.

APPEAL IN FORMA PAUPERIS:

1. It is for the Legislature to provide the requirements and restrictions as to appeal without giving bond, and when not complied with the Courts have no right to disregard the statute, and the allowance of a motion to dismiss an appeal in such cases is a matter not of discretion but of right; therefore,

2. Where the case on appeal shows the defendant prayed an appeal and "upon filing his affidavit of his inability to give security for the cost of the appeal" was allowed to appeal without bond, the appeal will be dismissed on motion. *State* v. *Harris*, 830.

ARREST AND BAIL:

1. Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto. *Allison* v. *Maddrey*, 421.

2. A defendant held to arrest and bail can be discharged only (1), before trial, by giving bond or making deposit; section 298 of *The Code;* (2), at the trial, by the issue of fraud or allegations of tort being found in his favor; section 316 of *The Code;* (3), after (or before) judgment against him, by payment or giving notice and surrendering all property in excess of fifty dollars; section 2972 of *The Code*. *Fertilizer Co.* v. *Grubbs*, 470.

3. Where a debtor arrested and imprisoned for fraud did not tender the oath required by sections 2968–2972 of *The Code* to the effect that he had not property of the value of fifty dollars, nor sur-

render his homestead and personal property exemptions, nor file the petition, nor give the notice required by ch. 27, Vol. II of *The Code*, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was, at the date of the affidavit, insolvent and not worth more than the exemptions allowed him by law as set apart to him. *Ibid.*

4. Where a firm of merchants gave to manufacturers of fertilizers their note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin* v. *Maddrey*, 89.

5. Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, for all the purposes of arrest and bail, from such knowledge and act. *Ibid.*

ASSAULT:

Where an indictment, found in October, 1893, charged that on the 1st of July, 1893, defendant made an assault with a deadly weapon, to-wit, a certain rock, knife and brickbat, want of jurisdiction did not appear, for, time not being of the essence of the offence, the charge would have been sustained and the jurisdiction maintained by proof of a simple assault more than one and less than two years from the finding of the indictment. *State* v. *Ridley*, 827.

ASSIGNABILITY OF HOMESTEAD RIGHT, 377:

The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner* v. *Batts*, 496.

ASSIGNMENT:

Where a surviving partner of a firm conveyed to "C., administrator" of the deceased partner, the assets of the firm to enable "C., administrator, to pay off all the debts and liabilities of the deceased partner, including the debts of the firm, and to legally account for all such moneys as may come into his hands by virtue of the assignment": *Held*, that the assignor (the surviving partner) is entitled to bring suit against C. individually for an accounting of his trusteeship. *Weisel* v. *Cobb*, 22.

ATTACHMENT:

1. An attachment could not be had in an action for unliquidated damages for injury to realty prior to ch. 77, Acts 1893, since the affidavit to procure an attachment must set forth one of the grounds recited in section 347 of *The Code*. *Mullen* v. *Canal Co.*, 8.

2. Service of process by publication based on an attachment issued in an action for unliquidated damages is invalid, except in cases specified in *The Code*, §347, and amendatory act, ch. 77, Acts 1893. *Ibid.*

3. Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons and, hence, actual service in another State "in lieu of publication" would be invalid. *Long* v. *Insurance Company*, 465.

4. Where the enforcement of a debt or other liability is sought by subjecting property of a non-resident, the jurisdiction is based upon the seizure of the property and only extends to the property attached; and no personal judgment can be rendered against the defendant, not even for the costs, or affecting other property within the State. *Ibid.*

5. The Court has power to permit amendment of an affidavit in attachment proceedings which was insufficient as failing to state how the debt arose, and from an order granting such amendment no appeal lies. *Cook* v. *Mining Co.*, 617.

6. An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. *Ibid.*

7. Parties who intervene in attachment proceedings cannot be heard to object to the irregularity of the same, that being a matter between the parties to the main action. *Ibid.*

ATTORNEY:

1. An attorney to whom a note is sent for collection has, *prima facie*, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. *Sherrill* v. *Clothing Co.*, 436.

2. In such case the acquiescence by the client in such indorsement, supposing it to have been a mere sale of the note, does not constitute a ratification of the unauthorized indorsement. *Ibid.*

BANK, INSOLVENT, 343.

BANKS AND BANKING:

1. Plaintiff bank rediscounted for N. Bank, along with other notes, a note of the defendants (against which the latter claimed an equity) and placed the proceeds to the credit of N. Bank, and before receiving notice of the equity paid checks of N. Bank to the extent of half of the proceeds of such rediscount: *Held*, that plaintiff was a purchaser of such note for value, although between the date of such rediscount and notice of the equity plaintiff had credited other items to N. Bank and at time of such notice owed the latter more than the proceeds of the rediscount. *Bank* v. *McNair*, 335.
2. Where, under an agreement between plaintiff bank and its correspondent N. H. Bank it was agreed that the latter should collect commercial paper and checks forwarded it by the plaintiff for a commission and remit daily for the proceeds, the relation of principal and agent as to any paper ceased on its collection and the relation of creditor and debtor arose immediately as to the cash (or its equivalent). *Bank* v. *Davis*, 343.
3. Where, under such agreement, the proceeds of such collections were mingled with the proceeds of the N. H. Bank, the cashier of which had no knowledge of its insolvency until its failure, the N. H. Bank cannot, upon its failure, be chargeable with a conversion of plaintiff bank's funds, since, in the absence of such knowledge on the part of the cashier, the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in full force until the failure. *Ibid.*

BAR-ROOM:

The Legislature may declare it unlawful for any minor to enter a bar-room. *State* v. *Austin*, 855.

BASTARDY PROCEEDINGS:

1. The begetting of a bastard child, which formerly rendered the defendant amenable only in the civil proceeding, has, by the Act of 1879 (section 35 of *The Code*), become a petty misdemeanor, and the defendant may, under the authority of section 3448 of *The Code*, be put to work on the public roads until the fine and costs are paid. *Myers* v. *Stafford*, 234.
2. In the trial of a defendant charged with bastardy an instruction by the Court that the affidavit of the woman that the defendant was the father of the child was presumptive evidence against the defendant was proper and followed the statute, section 32 of *The Code*. *State* v. *Cagle*, 835.

3. In the trial of bastardy proceedings a witness for the State, in reply to a question on cross-examination, said, "I do not keep a bawdy-house": *Held*, that such answer was conclusive, and could not be contradicted by hearsay evidence as to the bad character of the witness. *Ibid.*

4. Bastardy proceedings, being under section 35 of *The Code* (as held in *State* v. *Burton*, 113 N. C., 655, and *Myers* v. *Stafford*, 114 N. C., 234) a criminal action in respect to the fine directed to be imposed, properly stand for trial on a day set apart for the trial of criminal actions only. *Ibid.*

BOND:

1. A bond negotiable in form and indorsed for value and without notice before maturity is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. *Christian* v. *Parrott*, 215.

2. The obligor in such a bond cannot set up the defence that prior to its transfer the payee agreed to release him from liability thereon. *Ibid.*

3. The lapse of three years protects the surety on a sealed instrument. *Coffey* v. *Reinhart*, 509.

4. Although a bond is joint and several on its face the suretyship of an obligor may be shown by parol, but to obtain protection by the lapse of three years the surety must show that his relation was known to the creditor. *Ibid.*

5. If the suretyship of the surety is known to the original payee and the note be assigned after maturity the surety will be protected by the lapse of three years after maturity, although the assignee takes without notice; otherwise if the note be assigned before maturity to one without notice. *Ibid.*

6. If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Ibid.*

BOND TO COVER DAMAGES, When allowed pending application for injunction, 505.

BONDS, MUNICIPAL: See "MUNICIPAL BONDS."

BOUNDARIES: See "SURVEY."

BREACH OF CONTRACT:

Where a contract for the sale of personal property was void the seller cannot, by virtue of the same or by reason of any mere technical acceptance under it and where there has been no delivery to and conversion by the vendee, recover the difference between the contract price and the amount for which the vendor, after tender, afterwards sold the property. *Curtis* v. *Lumber Co.*, 530.

BREACH OF TRUST:

1. Where a firm of merchants gave to manufacturers of fertilizers their notes for a consignment of goods, agreeing to hold such goods, or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin* v. *Maddrey*, 89.
2. The intent with which a breach of trust is committed is immaterial; and hence, where in the trial of an action for a breach of trust, aided by the ancillary remedy of arrest and bail, the plaintiffs, in reply to the testimony of defendants that they intended no breach of trust, were permitted to introduce evidence of other breaches of trust by the defendants: *Held*, that such evidence was harmless, and its admission, upon the question of intent only, was not error. *Ibid.*
3. Where members of a firm assume a fiduciary relation as to property committed to them and a misappropriation is made by one partner with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, for all the purposes of arrest and trial, from such knowledge and act. *Ibid.*

BURDEN OF PROOF:

1. Where one party to a contract relies upon a renunciation of it by the other the burden is upon him to show by positive and unequivocal proof, not only that the other party abandoned the contract but that he, himself, accepted the renunciation. *Sitterding* v. *Grizzard*, 108.
2. Negligence being a failure of duty, proof that a "live wire" carrying a deadly current of electricity was hanging over and lying upon a sidewalk, and that it had been placed above the street by and was the property of the defendant corporation and was under the control of the servants of the latter, and that by contact with such wire a person, having a right to be on the street, was killed, constituted a complete *prima facie* case of negligence, and the burden was put upon the defendant to show that the wire was not down through any negligence of itself or its servants or agents. *Haynes* v. *Gas Company*, 203.

3. The existence of near relationship between parties to a suspicious transaction often constitutes additional evidence of fraud for the jury, but, in the trial of an action to set aside a conveyance on the ground of fraud, it was error to instruct the jury that proof of the existence of near relationship between a grantor and grantee named in a deed amounts to a *prima facie* showing of fraud so as to make it incumbent on the parties upholding the deed to offer affirmative testimony to show good faith or submit to a verdict on an issue of fraud. *Bank* v. *Bridgers*, 383.

4. The burden of proof is upon an indorser to show any agreement by which his liability was restricted. *Davidson* v. *Powell*, 575.

5. Where, on trial for an affray, the defendant admitted that he used a deadly weapon, the question of reasonable doubt as to his guilt was eliminated and the burden of showing matter of mitigation, excuse or justification to the satisfaction of the jury was thrown upon the prisoner. *State* v. *Barringer*, 840.

CASE ON APPEAL:

1. A *certiorari* will be denied where it does not appear that the matters omitted from the case settled are relevant to the exceptions presented on appeal or were omitted by mistake or inadvertence of the Judge below, although the latter is willing to supply the omission. *Bank* v. *Bridgers*, 107.

2. Service of a case on appeal by a town constable is a nullity. *Forte* v. *Boone*, 176.

3. Failure to serve a case on appeal on the appellee legally and in due time cannot be cured by the action of the Judge below in thereafter settling the case. *Ibid.*

4. In the absence of a valid case on appeal the judgment below will be affirmed unless error appear on the face of the record. *Ibid.*

5. Where no case on appeal accompanies the record and no error is apparent on the face of the latter, the judgment below will be affirmed. *Maggett* v. *Roberts*, 227.

6. The mere fact that a Judge who tried a cause has gone out of office will not prevent his settling the case on appeal. *Ritter* v. *Grimm*, 373.

7. Where the trial Judge is unable to settle the case on appeal because of the loss of his notes of the trial and of the papers, and the parties cannot agree on a case, and the appellant has been diligent in endeavoring to have the case on appeal settled by the Judge, a new trial will be granted. *Ibid.*

8. Where there is no case on appeal the judgment will be affirmed unless error appear on the face of the record. *Fertilizer Co.* v. *Black*, 591.

CERTIFICATE OF PROBATE (see, also, "PROBATE" and "NOTARY PUBLIC"):

The certificate of a Notary Public concerning the probate or acknowledgment of deeds is *prima facie* evidence of the truth of its pertinent recitals. *Pipe and Foundry Co.* v. *Woltman*, 178.

CERTIFICATE OF MARRIAGE IN FOREIGN COUNTRY:

Where, in the trial of an indictment for fornication and adultery, the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and seal of the official minister of such foreign country, although inadmissible as a record or an independent declaration of the rabbi, was competent as a part of the *res gestæ* to support the testimony of the prosecuting witness as to the fact of the marriage. *State* v. *Behrman*, 797.

CERTIORARI:

1. A *certiorari* will be denied where it does not appear that the matters omitted in the case settled are relevant to the exceptions presented on appeal or were omitted by mistake or inadvertence of the Judge below, although the latter is willing to supply the omission. *Bank* v. *Bridgers*, 107.

2. Where the Clerk of the Court below delays to send transcript of record in time to docket the appeal a *certiorari* should be applied for by the appellant at the Term next succeeding the trial below, but after the expiration of such Term a *certiorari* will not issue. *Graham* v. *Edwards*, 228.

3. An appellant, instead of docketing the appeal during the September Term of this Court (as might have been done, the appellee not having moved to docket and dismiss), toward the latter part of the Term (December 16, 1893) applied for a *certiorari* to be heard on December 18th; the required time of notice was not shortened by the Court and the notice itself was not given to the officer for service until the 12th January, 1894: *Held*, that on account of the laches and irregularity of petitioner the writ will not be issued. *Sanders* v. *Thompson*, 282.

4. The Clerk of the Court below is entitled to receive his fees before being required to send up a transcript on appeal, and, therefore, a writ of *certiorari* will be refused where it appears from the affidavit of the Clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the Clerk's affidavit the petitioner did not tender the fees. *Ibid.*

5. Where an application for *certiorari* states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. *Ibid.*

6. Where an appellant has ground for a *certiorari* he should move for it before the case is reached for argument. *State* v. *Harris*, 830.

7. Where an appellant, without whose default the case on appeal was not settled by the Judge, failed to docket the transcript of the record at the next succeeding Term of this Court, but applied at such Term for a *certiorari*, the writ will not be allowed. *State* v. *Freeman*, 872.

CESTUI QUE TRUST, 590:

Power of, to dispose of his estate by will. *Holt* v. *Holt*, 241.

CHALLENGE: See "JUROR."

CHARACTER WITNESS:

A witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question. *State* v. *Coley*, 879.

CHARGE UPON LAND, 370.

CHARGE ON SEPARATE ESTATE OF MARRIED WOMAN, 613.

CHARTER:

Of City, amendment of, 678.

Of Street-railway:

The legislative charter of a street-railway company granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities of a town," gave such authorities no power to grant *exclusive* privileges to the railway company.

(*Quære*, whether the Legislature has the right to authorize a city to grant such exclusive privileges). *Railway* v. *Railway*, 725.

CHILD:

1. An infant twenty-two months old is incapable of contributory negligence so as to relieve a railroad from liability for the negligent acts of its employees. *Bottoms* v. *Railroad*, 699.

2. The negligence of a parent or guardian in allowing a child of tender years to stray and wander on a railroad track cannot be imputed to such child so as to relieve a railroad company from responsibility for the negligence of its employees in an action brought by or on behalf of the child. *Ibid.*

CHILDREN UNBORN:

Under a deed to a woman "and her children" a child *en ventre sa mere* at the date of the conveyance will take, but children born more than a year thereafter will not. *Heath* v. *Heath*, 547.

CITY, POWER OF TO GRANT EXCLUSIVE PRIVILEGES:

The legislative charter of a street-railway company granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities of a town," gave such authorities no power to grant *exclusive* privileges to the railway company. (*Quære*, whether the Legislature has the right to authorize a city to grant such exclusive privileges). *Railway* v. *Railway*, 725.

CITY TAXES, Garnishment for, 310.

CLAIM AND DELIVERY:

A bill of sale which recited that, in consideration of a sum "paid by W., agent" for plaintiff, a bargainor sold and conveyed a stock of goods, vested the title in the plaintiff and not in the agent, and the former may maintain an action of claim and delivery for the goods. *Woolen Co.* v. *McKinnon*, 661.

CLERK OF SUPERIOR COURT:

The Clerk of the Court below is entitled to receive his fees before being required to send up a transcript on appeal. *Sanders* v. *Thompson*, 282.

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COLLATERAL:

Where, in order to induce plaintiff to postpone the sale of his land under deed of trust, C. promised to pay $280 on another debt which C. owed him and the sale was stopped, and plaintiff went with C. and W. to a bank where W. gave the banker at plaintiff's request a certified check to be held as collateral security for the $280: *Held*, that plaintiff was entitled to have the check condemned to the payment of the $280, and that W. could not demand that plaintiff release certain lots from the operation of the deed of trust as had been agreed upon between C. and W. *Penland* v. *Crapo*, 608.

COLLATERAL ATTACK, 690:

Where the jurisdiction of the Court is voidable by matter *de hors* the record, but no defect of authority appears upon an inspection of the record of an indictment, trial and conviction, such a record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted though it was not defeated. *State* v. *Ridley*, 827.

COLOR OF TITLE:

1. Though it is not necessary to show continuous and unceasing possession of land for the statutory period of twenty-one years in order to raise a presumption of a grant from the State, but only that in the aggregate the actual possession has extended over such period, yet, where written evidence of title is offered as color merely, the possession must be manifested by unequivocal acts of ownership such as would have subjected the occupant not simply to an action of trespass *quære clausum fregit*, but to a possessory action at common law. *Hamilton* v. *Icard*, 532.
2. Though one has color of title to land he acquires title by adverse possession to none by planting some part of it in tobacco every year for more than the statutory period, no part being planted for more than two years, and each part being inclosed only for the time it is cultivated. *Ibid.*
3. The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State (*The Code*, §139, subd. 2)—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. *Ibid.*
4. Under *The Code*, §141, providing that no action shall be had against one who has been in possession of land, under color of title, for seven years, by one having right or title thereto, except during the seven years next after his right or title shall have descended or accrued, the statute begins to run against one to whom a grant of the land has been made only from the time of the grant. *Ibid.*

COMMISSIONS OF TRUSTEE:

A trustee in a deed of trust, with power of sale, is entitled to his commissions after default and advertisement though the debt be paid before the sale. *Cannon* v. *McCabe*, 580.

CONCEALED WEAPONS:

The offence of carrying a concealed weapon consists in the guilty intent to carry the weapon concealed, and does not depend upon the intent to use it; therefore, where, in the trial of one charged with carrying concealed weapons, he testified that he carried it for the purpose of selling it, the trial Judge properly instructed the jury, in effect, that there was no evidence to go to the jury to rebut the presumption of guilt which the statute raised from the possession, about his person and off his own premises, of a concealed deadly weapon. *State* v. *Dixon*, 850.

CONDITIONAL LIMITATION: See "DEVISE."

CONDUCTOR OF TRAIN:

A conductor in charge of a railroad company's train is, as to those subject to his orders on the same train, a vice-principal acting for the company. *Mason* v. *Railroad*, 718.

CONFIRMATION OF SALE:

The confirmation of a sale made under order of Court, at which a trustee became the real purchaser, the Court not having knowledge of the fact that the purchaser was a trustee, does not destroy the trust relation. *McEachern* v. *Stewart*, 370.

CONFLICT OF STATE AND TOWN LAWS:

1. Although the act of selling liquor without license in violation of revenue laws of the State and of its police regulations, and also of the ordinance of a city, is *one* act, the offences are different, for which the offender must answer in the proper jurisdictions; therefore an ordinance of a city imposing a fine or penalty for selling liquor without license does not conflict with the general laws of the State prohibiting the sale of liquor without license, and is therefore valid. *State* v. *Stevens*, 873.
2. Such ordinance being valid, and the violation of it being made by statute a misdemeanor of which a mayor has jurisdiction, a prosecution under it does not conflict with any criminal action pending or that may be instituted against the defendant on account of the alleged selling as an act in violation of the general State law. *Ibid.*

"CONNOR'S ACT": See "REGISTRATION."

CONSENT JUDGMENT:

1. An order or judgment made by consent cannot be vacated or modified, even at the term at which it is entered, without the consent or acquiescence of all parties to the action, unless it appear affirmatively that its rendition was procured by the mutual mistake of all the parties or by fraud. *Deaver* v. *Jones*, 649.
2. Where, in the trial of an action, the verdict of a jury was set aside by consent, it was error to re-instate the verdict despite the objection of one of the parties, it not appearing affirmatively that the first order was procured by fraud. *Ibid.*

CONSEQUENTIAL DAMAGES:

1. Consequential damages, to be recoverable in an action of tort, must be the proximate consequence of the act complained of; and such damage must be capable of computation with reasonable certainty. *Walser* v. *Telegraph Company*, 440.
2. Where defendant telegraph company failed to deliver to plaintiff a message sent to the latter by the Comptroller of the Currency as follows: "Would you accept receivership of First National Bank, Wilmington? Bond $35,000; compensation $200 per month, subject to future modification," and the pleadings in an action for damages for such failure to deliver raised no question as to exemplary damages, the plaintiff was entitled to recover only nominal damages, inasmuch as if the message had been received and an affirmative reply sent there would have been no legal obligation upon the Government or its appointing power to confer the office upon the plaintiff. *Ibid.*

CONSTABLE, TOWN:

A town constable has no authority, under section 3810, as construed with section 644, to serve any papers for the Superior Court except process; an appellant's case on appeal from the Superior Court is not *process;* hence, service of a case on appeal by a town constable is a nullity. *Forte* v. *Boone*, 176.

CONSTITUTION:

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" 4, " 21 927
" 4, " 26 927
" 4, " 33 928
" 9, " 2 320
" 9, " 10 317
" 10, " 1 312
" 10, " 2 503
" 10, " 8 564

CONSTRUCTIVE NOTICE:

1. The filing of a deed for registration is in itself constructive notice; and hence,
2. The failure of the Register of Deeds to index a deed which has actually been registered cannot impair its efficacy. *Davis* v. *Whitaker*, 279.

CONSTRUCTIVE POSSESSION:

1. Where the boundaries of two grants or deeds lap upon each other the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage. *Boomer* v. *Gibbs*, 76.
2. Possession of part of the lappage by the one having the inferior title gives constructive possession of the whole lappage so long as the one having the better title has not actual possession of any part. *Ibid.*

CONTINGENT REMAINDER:

1. Where there are contingent interests to be affected by the proceeding for the sale of land for partition it will be decreed if there is some one before the Court to represent such interest, it being a general principle that every one has a right to enjoy his own in severalty. *Overman* v. *Tate*, 571.
2. The interest in land of one co-tenant was conveyed to T. and his heirs in trust for the sole and separate use of T.'s wife for life "and at her death to such child or children and the representatives of such as she shall have living by the said T., and their heirs forever," and in default of such child or representative of such living at the death of the wife, then to T. and his heirs; T. died leaving him surviving his wife and two children by her, as well as children and grandchildren by a former marriage: *Held*, in a suit for a sale for partition to which all of the persons named, together with the trustees, are parties and ask for the sale, the co-tenant is entitled to have the land sold for partition. *Ibid.*

CONTRACT:

Where a contract of lease of land made to enable the lessee to erect a building thereon provided that the lessee and his assigns should have entire control of such building and that the lease should continue until the lessors should sell the lot, the latter to give the lessee and his assigns thirty days' notice after the sale to remove the building, etc.; and further, that the lease should "be determined only on the sale of the land and the giving of the thirty days' notice, as hereinbefore mentioned": *Held*, that the true intent and effect of such provisions were that the lease should terminate whenever the lessors should dispose of all their interest in the land so leased, and that the lessees should have thirty days' notice of such sale to enter upon the lot and remove the building. *Aydlett* v. *Pendleton*, 1.

2. An agreement between B. and S. set out that B. had employed S. as clerk to superintend B.'s store as long as the latter chose to employ him, S. to have half the net profits, and further declared that S. was a half owner of all the goods, moneys, accounts, notes, etc., belonging to the store: *Held*, that such agreement constituted a partnership, and S., as surviving partner, is entitled to collect the firm's bank balance. *Sawyer* v. *Bank*, 13.

3. The refusal of a purchaser of land to pay an exorbitant charge for a survey of land that was to be made at the joint expense of the vendor and vendee cannot work a forfeiture of his right to a conveyance if he has complied with the terms of the contract. *Davis* v. *Terry*, 27.

4. Where A contracted to convey lands to B, who paid the purchase-money therefor, and B afterwards brought suit to have the written contract reformed so as to include more land which he alleged A verbally agreed to convey, such suit, though unsuccessful, was not a repudiation by B of the written contract, and cannot have the effect of depriving him of his right to a specific performance of the same. *Ibid.*

5. An agreement to take a deed without warranty is not a waiver of the right to demand a clear title. *Leach* v. *Johnson*, 87.

6. S. agreed to buy and pay cash for certain tracts of timber land which G. might thereafter contract for to the extent of $4,000, G. agreeing to take the same at an advance of fifteen per cent. at the expiration of one year, and in the meanwhile to cut and sell the timber: *Held*, that the contract established between S. and G. the relation of *vendor* and *vendee* and was not an *option;* the obligation being mutual, neither could escape its force without the consent of the other. *Sitterding* v. *Grizzard*, 108.

7. Where one party to a contract relies upon a renunciation of it by the other the burden is upon him to show by positive and unequivocal proof not only that the other party abandoned the contract, but that he, himself, accepted the renunciation. *Ibid.*

8. In order to constitute a contract there must be a proposal squarely assented to: an acceptance based upon terms varying from those offered is a rejection of the offer, and unless such counter-proposal is accepted and its acceptance communicated to the proposer there is no contract; therefore,

9. Where a corporation wrote to H. offering to buy his land for a certain amount of its capital stock, and he replied assenting to the offer upon condition that he should reserve all the wood and timber on the land, and the directors on the same day voted to accept his proposition but such acceptance was not communicated to him, and about nine months thereafter H. withdrew his proposition, and there was no evidence that the stock was delivered or title made or any further action taken by either party in pursuance of such correspondence: *Held*, that there was no contract by which H. became a stockholder of the corporation. *Cozart* v. *Herndon*, 252.

10. Where the general manager of an industrial company, in order to induce a publishing company to take pay for an advertisement in the paid-up stock of the former, guaranteed that the stock would be worth par "within a year from date": *Held*, that the period covered by the guaranty was a year from the date of the contract, and not from the date of completion of the advertisement and issuance of the stock. *Times Co.* v. *Steel and Iron Co.*, 224.

11. In the trial of an action for a breach of a guaranty that a certain stock would be worth par within a year from date of the contract, evidence of the market value of such stock after the lapse of the year was properly excluded. *Ibid.*

12. Section 683 of *The Code* (now repealed), requiring contracts by corporations for more than one hundred dollars to be in writing, applied only to executory and not to executed contracts. *Clowe* v. *Pine Product Co.*, 304.

13. A corporation is liable on a contract made by its general manager within the scope of its business. *Ibid.*

14. In an action against a corporation for the board of its employees where there was no agreement as to the price or as to the length of time for which board was to be furnished, and extra services were rendered, the amount of compensation was properly left to the jury. *Ibid.*

15. A contract for delivery of goods "about November 1" is complied with by delivery on November 10th. *White* v. *McMillan*, 349.

16. A contract for the sale and delivery of an article provided for payment on delivery and authorized the seller to draw for the amount; the article was shipped "C. O. D." and the purchaser in a letter to the seller made no objections to the mode of delivery, but refused to receive the property on the ground that he was unable to pay for the same, as "money was scarce" and it "cost so much"; the article remained in the express office three months when it was recalled by the seller: *Held*, in an

action on the contract (1), that the fact that the article was shipped "C. O. D." was, under the circumstances, immaterial; (2), that after the positive refusal of the defendant to receive and pay for the article it was not incumbent on plaintiffs to longer keep it at the place of delivery agreed upon. *Ibid.*

17. Where a contract for the sale of personal property was void the seller cannot, by virtue of the same or by reason of any mere technical acceptance under it and where there has been no delivery to and conversion by the vendee, recover the difference between the contract price and the amount for which the vendor, after tender, afterwards sold the property. *Curtis* v. *Lumber Co.*, 530.

18. Where defendant gave to plaintiff and his wife a written agreement to pay them during life, as rent on lands conveyed by the will of the husband, "every year one-sixth part of all the produce raised on said lands, any lands conveyed or which may be conveyed by them, the rents to be paid of such lands," and plaintiffs thereafter conveyed to defendant by deed the land the husband had set apart to defendant by will, and in the deed acknowledged the receipt of the purchase-price: *Held*, that, no rights of third persons having intervened, plaintiffs were not estopped to enforce the contract for rents. *Long* v. *Freeman*, 567.

19. Where a real estate agent negotiated a sale of land for a person who agreed with him in writing to convey it to the purchaser who was to pay the agent's commissions and such person refused to convey it, the agent may recover in an action for the breach of the contract by showing that the intending purchaser was able and willing to carry out the trade. *Atkinson* v. *Pack*, 597.

20. The measure of damages for such breach of contract is the amount the agent would have received as commissions from the purchaser if the bargain had been complied with by the defendant. *Ibid.*

21. Where, in order to induce plaintiff to postpone the sale of his land under deed of trust, C. promised to pay $280 on another debt which C. owed him and the sale was stopped, and plaintiff went with C. and W. to a bank where W. gave the banker at plaintiff's request a certified check to be held as collateral security for the $280: *Held*, that plaintiff was entitled to have the check condemned to the payment of the $280, and that W. could not demand that plaintiff release certain lots from the operation of the deed of trust as had been agreed upon between C. and W. *Penland* v. *Crapo*, 608.

22. A note signed by husband and wife containing a clause, "and the said husband hereby consents that the above note shall be a

charge on the separate estate of his said wife for the payment of this note," expressly charges the separate personal estate of the wife. *Jones* v. *Craigmiles*, 613.

23. In the case of an express charge it is not necessary that it should appear that the consideration is beneficial to the wife nor that the separate estate should be specifically described. *Ibid.*

24. To make a contract of husband and wife an express charge upon her separate personal estate it is unnecessary that the assent of the husband shall be signified by a separate clause, his execution of the paper jointly with his wife being a sufficient compliance with the law in this respect. *Ibid.*

25. It is necessary in an action to enforce an executory contract of a married woman, as a charge upon her separate estate, that the complaint should describe the property to be charged. *Ibid.*

26. In an action to have the contract of a married woman declared a charge upon her separate estate equity will, in proper cases, lend its aid by the appointment of a receiver or by other interlocutory orders necessary to protect the rights of the creditors. *Ibid.*

27. Where S., a druggist, in selling out a part of his stock to plaintiffs, agreed not to engage in the drug business in a certain town either directly or indirectly and afterward sold the remainder of his stock to defendant D., who gave a mortgage upon the stock to secure the purchase price, and conducted a drug business in the town: *Held*, in an action to enjoin D. from conducting such business, that he is not an agent of S., the mortgagee, in the sense of conducting a business forbidden by the contract between S. and plaintiffs, and cannot be enjoined from carrying it on. *Reeves* v. *Sprague*, 647.

28. A bill of sale which recited that, in consideration of a sum "paid by W., agent" for plaintiff, a bargainor sold and conveyed a stock of goods, vested the title in the plaintiff and not in the agent, and the former may maintain an action of claim and delivery for the goods. *Woolen Co.* v. *McKinnon*, 661.

29. Where plaintiff consigned to defendants a stock of goods, the latter to conduct the business in the name of the former and to account to plaintiff for all proceeds, and plaintiff brought action of claim and delivery: *Held*, that the denial, in defendants' answer, of plaintiff's ownership was a repudiation of the contract and rendered it unnecessary for plaintiff to prove a demand for an accounting and a refusal before bringing action. *Ibid.*

30. In claim and delivery by the owner of a stock of goods under a contract with defendants entitling the latter to retain possession

and to be revested with the title whenever the net profits paid to the owner should amount to $750, the defendants are entitled to an accounting to ascertain the amount of net profits paid over so that the owner may be charged with the same in adjusting the rights of the parties. *Ibid.*

31. Where an administrator sold land, taking grantees' notes for balance of purchase-money, containing a stipulation that they were not payable or transferable until all liens and liabilities on and against the lands should be discharged, and such notes were secured by a deed of trust under which the trustee was preparing to foreclose, and vendees sought an injunction upon the ground that there were various claimants for parts of the land and suits pending for one-sixth of it, to which the administrator replied that those matters had been passed upon by the vendees' attorney and that the vendees bought with full knowledge of the pending suits and conflicting claims and that the stipulation in the notes referred only to judgments against decedent's estate, which had since been paid, and to the balance of a mortgage debt due by decedent's estate, which would be paid out of the money to be paid by plaintiffs (the vendees): *Held*, that it was proper to continue the injunction to the hearing. *Atkinson* v. *Everett*, 670.

CONTRACT, Damages for breach of, 483.

CONTRIBUTORY NEGLIGENCE:

1. Where, in the trial of an action for an injury resulting in death and caused by the alleged negligence of defendant, it appeared that the deceased, an intelligent boy ten years old, while walking on the sidewalk of a street, grasped a "live" guy wire hanging to the street and belonging to the defendant, and was killed by the contact, and there was no visible indication that the wire was charged with electricity: *Held*, that the trial Judge should have told the jury that there was no evidence of contributory negligence on the part of the deceased. *Haynes* v. *Gas Co.*, 203.

2. An infant twenty-two months old is incapable of contributory negligence so as to relieve a railroad from liability for the negligent acts of its employees. *Bottoms* v. *Railroad*, 699.

3. The negligence of a parent or guardian in allowing a child of tender years to stray and wander on a railroad track cannot be imputed to such child so as to relieve a railroad company from responsibility for the negligence of its employees in an action brought by or on behalf of the child. *Ibid.*

4. While an engineer of a moving train has the right to suppose that an adult on the track will leave it and is not required to slacken

speed, yet when a child without discretion or intelligence is seen or can be seen its presence must be regarded; and if the engineer, by the exercise of reasonable care and prudence, can discover a child on the track in time to stop the train, or can, with the exercise of reasonable or ordinary care and prudence, discover that a small child is going towards the track or running near so as to make it probable that it will go on the track, and such discovery can be made in time to stop the train, it is the duty of the engineer to stop and negligence in the company if he does not stop. *Ibid.*

5. Where a plaintiff brakeman disregarded the rules of a railroad company forbidding brakemen to go between the cars in coupling them, which he had agreed to observe, and was injured, the fact that the conductor of the train, who had previously seen him go between cars in coupling them, told him to "hurry up and couple the cars" did not amount to an order to go between the cars so as to relieve the plaintiff from the imputation of contributory negligence in so doing. *Mason* v. *Railroad*, 718.

6. While a brakeman is not culpable for exposing himself to danger in disregard of the rules of the company but in obedience to the orders of the conductor in charge of the train, yet the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not otherwise be coupled did not justify him in doing so several months later when under the control of another conductor who gave no such order. *Ibid.*

7. Where plaintiff and defendant were both concurrently negligent and the negligence of the former was the proximate cause of injury to the plaintiff the latter cannot recover damages for the same. *Ibid.*

8. In the absence of imminent danger the mere going upon the track is not contributory negligence, but it is the duty of a person to look and listen for the approach of the train, and if, by his failure to exercise such care, a collision occurs he will be deemed guilty of such contributory negligence as would bar an action for the injury. *Smith* v. *Railroad*, 728.

9. It is an elementary principle that intoxication will never excuse one for a failure to exercise the measure of ordinary care and prudence which is due from a sober man under the same circumstances; a person cannot thus voluntarily incapacitate himself from ability to exercise ordinary care and then set up such incapacity as an excuse for his negligence; therefore, where the breach of duty on the part of the defendant consisted simply in a failure to discover an intoxicated person lying on its track in time to avert injury, the negligence of such person continues, as in

the case of a sober man, up to the moment of the collision, is concurrent with, if not indeed subsequent to, that of the defendant, and thus, being a proximate cause of the accident, constitutes contributory negligence which bars a recovery. It would be otherwise if the engineer, knowing or having reason to believe that such person was lying helpless on the track, failed to use all the means in his power to avoid the injury. *Ibid.*

CORPORATION:

1. Where a corporation wrote to H. offering to buy his land for a certain amount of its capital stock, and he replied assenting to the offer upon the condition that he should reserve all the wood and timber on the land, and the directors on the same day voted to accept his proposition but such acceptance was not communicated to him, and about nine months thereafter H. withdrew his proposition, and there was no evidence that the stock was delivered or title made or any further action taken by either party in pursuance of such correspondence: *Held*, that there was no contract by which H. became a stockholder of the corporation. *Cozart* v. *Herndon*, 252.
2. Section 683 of *The Code* (now repealed), requiring contracts by corporations for more than one hundred dollars to be in writing, applied only to executory and not to executed contracts. *Clowe* v. *Pine Product Co.*, 304.
3. A corporation is liable on a contract made by its general manager within the scope of its business. *Ibid.*
4. Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defence that the corporation was not legally organized. *Cotton Mills Co.* v. *Burns*, 353.
5. The fact that a corporation avails itself of only one of several privileges granted by its charter—that is, manufacture all the products it is permitted to manufacture—does not invalidate the act of incorporation. *Ibid.*
6. Where articles of agreement signed by a subscriber to the stock of a corporation provided that the installments falling due on the subscription should bear eight per cent. interest, such rate continues until actual payment. *Ibid.*
7. The existence of a railroad corporation cannot be attacked or questioned in an action brought by it to condemn land for its purposes. *Railroad Co.* v. *Lumber Co.*, 690.

COUNSEL:

1. An alleged verbal agreement between counsel that an appeal not docketed at the proper time should go over to the next Term will not be considered if denied by the appellee. *Graham* v. *Edwards*, 228.
2. Notwithstanding the statute (sec. 412 (4) of *The Code*) requires a motion to set aside a verdict on the ground of excessive damages assessed thereby to be heard at the same term of Court at which the trial is had, yet, by agreement of counsel, a motion made at the trial term may be heard and determined by the same Judge at a subsequent time. *Myers* v. *Stafford*, 231.
3. In the trial of an action to set aside as fraudulent a deed of trust from one brother to another it is in the sound discretion of the trial Judge to permit counsel to comment on the failure of the defendant to introduce as witnesses other parties to the transaction. *Bank* v. *Bridgers*, 383.
4. Where the Solicitor, in reply to a remark by the defendant's counsel that the defendant was a respectable white man, said to the jury that he himself was a colored man and that if the defendant was a colored man the jury would convict him in five minutes on the evidence, the error (if any) in permitting such remarks to the jury was cured by a caution by the Court, in its charge, not to be influenced by the remark complained of. *State* v. *Hill*, 780.

COUNTER-CASE ON APPEAL: See "APPEAL."

COUNTER-CLAIM:

1. Although a counter-claim set up in an answer and admitted therein to be the subject of another action pending between the parties will be abated upon the objection of the plaintiff by a proper pleading, yet such objection, if waived, cannot afterward avail the plaintiff. *Davis* v. *Terry*, 27.
2. A counter-claim for damages for the malicious prosecution of a prior action which fails to allege facts showing that the prosecution of such prior action was without probable cause, is bad. *Ibid.*
3. Where the defendant, in an action to recover land, sets up a counter-claim for substantive relief the plaintiff is not entitled to take a nonsuit. *Wilkins* v. *Suttles*, 550.

COUNTS IN INDICTMENT:

1. Where, after verdict and judgment, the Court set the same aside and granted a new trial, it was allowable to put the defendants upon trial on a new indictment found at the same term,

upon the same testimony of the same witnesses, the two bills being treated as several counts in the same indictment. *State* v. *Lee*, 844.

2. Where, upon an indictment containing two counts, one of which is good, there is a general verdict of guilty, the verdict will be presumed to be on the valid count and will support the judgment. *Ibid.*

COUNTY COMMISSIONERS:

County Commissioners who ordered a defendant in bastardy proceedings, who had been committed to jail in default of payment of the allowance, fine and costs, to be put at work on the public roads of the county are not liable therefor in an action for damages by such defendant. *Myers* v. *Stafford*, 234.

COUPLING CARS:

Where a plaintiff brakeman disregarded the rules of a railroad company forbidding brakemen to go between the cars in coupling them, which he had agreed to observe, and was injured, the fact that the conductor of the train, who had previously seen him go between cars in coupling them, told him to "hurry up and couple the cars" did not amount to an order to go between the cars so as to relieve the plaintiff from the imputation of contributory negligence in so doing. *Mason* v. *Railroad*, 718.

CONVERSION, EQUITABLE: See "EQUITABLE CONVERSION."

CONVERSION OF FUNDS:

1. Where, under an agreement between plaintiff bank and its correspondent N. H. Bank it was agreed that the latter should collect commercial paper and checks forwarded it by the plaintiff for a commission and remit daily for the proceeds, the relation of principal and agent as to any paper ceased on its collection and the relation of creditor and debtor arose immediately as to the cash (or its equivalent). *Bank* v. *Davis*, 343.

2. Where, under such agreement, the proceeds of such collections were mingled with the proceeds of the N. H. Bank, the cashier of which had no knowledge of its insolvency until its failure, the N. H. Bank cannot, upon its failure, be chargeable with a conversion of plaintiff bank's funds, since, in the absence of such knowledge on the part of the cashier, the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in full force until the failure. *Ibid.*

CREDITOR AND DEBTOR, 343.

CREDITORS AND DEBTORS OF INSOLVENT BANK:

Debtors to an insolvent bank are those who, at the appointment of a receiver, are liable to the bank for the payment of money, whether as principal or surety or whether the liability be matured or not; and creditors are those to whom the bank is indebted at the date of the appointment of the receiver, whether the debts are due or not. *Davis* v. *Industrial Manufacturing Co.*, 321.

CREDITORS, Time of proving claims:

Though a day was set for all creditors of the company to come in and exhibit their claims the Court could, in its discretion, allow further time, or permit creditors to prove their claims after such time, on showing reasons for failure to come in within the time fixed. *Pipe and Foundry Co.* v. *Woltman*, 178.

CRIME COMMITTED IN ANOTHER STATE (see, also, "JURISDICTION"):

1. One State or sovereignty cannot enforce the penal or criminal laws of another or punish crimes or offences committed in and against another State or sovereignty. *State* v. *Hall*, 909.
2. Where the fatal stroke and death occur in the same State, the offence of murder at common law is there complete, and the Courts of that State can alone try the offender for that specific common law crime. *Ibid.*

CRIMINAL PROSECUTION:

1. A finding by the trial Judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." *State* v. *Baker*, 812.
2. In such case the person marked as prosecutor on a bill before it was acted on by the grand jury was properly adjudged liable for the cost. *Ibid.*

CROPS, Division of:

Where a landlord and his tenant through a common agent designated and set apart the share of the crop which the tenant was to have whenever the advancements were paid on it, and the tenant was told not to remove such share until the lien was paid off, there was no such division as to divest the lien of the landlord. *Jarrell* v. *Daniel*, 212.

CROPS ON MORTGAGED LAND:

Where a mortgagor was allowed to remain in possession and during such possession executed an agricultural lien under which he obtained advances in aid of the cultivation of the crop; and upon a suit for foreclosure the lands and rents were put into the hands of a receiver: *Held*, that, although the agricultural lien was improperly registered, it was good as between the lienee and mortgagor, and that equity would not subject the rents in the hands of the receiver to the payment of the mortgage indebtedness, except in subordination to the claim of such lienee, to be reimbursed to the extent of the advances made in aid of cultivation of the crops up to the time of the sequestration. *Carr* v. *Dail*, 284.

DAMAGES, Action for, 27, 70, 440, 482, 524, 597, 699.

DAMAGES:

1. Where one in consequence of a mistake in the transmission of a telegraphic message was induced to sell property at a less price than he could thereafter have sold it for, but did receive its then market value, he suffered no damage for which he can recover more than the cost of the telegram. *Hughes* v. *Telegraph Co.*, 70.

2. Consequential damages, to be recoverable in an action of tort, must be the proximate consequence of the act complained of; and such damage must be capable of computation with reasonable certainty. *Walser* v. *Telegraph Co.*, 440.

3. Where defendant telegraph company failed to deliver to plaintiff a message sent to the latter by the Comptroller of the Currency as follows: "Would you accept receivership of First National Bank, Wilmington? Bond $35,000; compensation $200 per month, subject to future modification," and the pleadings in an action for damages for such failure to deliver raised no question as to exemplary damages, the plaintiff was entitled to recover only nominal damages, inasmuch as if the message had been received and an affirmative reply sent there would have been no legal obligation upon the Government or its appointing power to confer the office upon the plaintiff. *Ibid.*

4. The owner of a building on another's land cannot recover, as damages for its detention, the rental value thereof, but only the actual damages suffered by such detention. *Eastman* v. *Commissioners*, 524.

5. Damages for a violation of contract are recoverable only as a compensation for loss sustained thereby; if no loss accrues, or if by reasonable diligence the injured party can reduce the loss to a nominal sum, only nominal damages will be allowed. *Hassard-Short* v. *Hardison*, 482.

6. Where, in the trial of an action for damages for breach of contract whereby defendants had agreed to deliver to plaintiff logs of a specified size for five years, it appeared that the defendants, in consequence of a dispute, ceased to deliver for one day, but

on the next day resumed and continued the delivery until plaintiff refused to receive the logs, and that defendants were willing and able to carry out the original agreement, and plaintiff had shown, in order to fix the amount of damage, the aggregate estimated loss from defendants' failure to furnish logs with which to operate the mill for a given period, the defendants were entitled to have the Court to instruct the jury to consider in diminution any profit which the plaintiff had realized, or might by reasonable diligence have realized, by purchasing logs from others or by entering into any new agreement with defendants and continuing to saw during the same period. *Ibid.*

7. In such case, whether the plaintiff brought his action after the lapse of a few days or at the end of the period over which the contract extended, the damage was the difference, if any, between the contract price and the price at which, by reasonable diligence, logs could have been procured, and if there was any interval, after the breach, during which the logs could not have been bought at any price, then for such period the damage was the net profit that would have been derived from sawing and selling the number of logs deliverable by the defendants under their contract during the entire period. *Ibid.*

8. Where a real estate agent negotiated a sale of land for a person who agreed with him, in writing, to convey it to the purchaser, who was to pay the agent's commission, and such person refused to convey it, the agent may recover in an action for the breach of the contract by showing that the intending purchaser was able and willing to carry out the trade. *Atkinson* v. *Pack*, 597.

9. The measure of damages for such breach of contract is the amount the agent would have received as commissions from the purchaser if the bargain had been complied with by the defendant. *Ibid.*

DAMAGES, Counter-claim for:

A counter-claim for damages for the malicious prosecution of a prior action which fails to allege facts showing that the prosecution of such prior action was without probable cause is bad. *Davis* v. *Terry*, 27.

DAMAGES, Excessive:

Notwithstanding the statute a motion to set aside a verdict on the ground of the excessive award of damages, if made at the trial term, may by consent be heard and determined at a subsequent term by the same Judge. *Myers* v. *Stafford*, 231.

DAMAGES FOR INJURY TO LANDS:

1. Where the enjoyment of an easement by a railroad in the lands of a land-owner has the effect of injuring adjoining lands of the

owner damages are recoverable for such injury. *Liverman* v. *Railroad*, 692.

2. In condemnation proceedings there can be no recovery of damages incident to the entry—such as for destruction of crops and the like—nor for use and occupation before plaintiff acquired title, for these are personal to the owner and do not pass to the grantee. *Ibid.*

DAMAGES, Measure of, 70, 482, 597.

DAMNUM ABSQUE INJURIA, 392.

DEADLY WEAPON, Use of:

1. Where on trial for an affray the defendant admitted that he used a deadly weapon, the question of reasonable doubt as to his guilt was eliminated and the burden of showing matter of mitigation, excuse or justification to the satisfaction of the jury was thrown upon the prisoner. *State* v. *Barringer*, 840.

2. The use of a weapon likely to produce death raises a presumption of malice only, and not of premeditation and deliberation. (CLARK, J., dissenting). *State* v. *Fuller*, 885.

3. Where a trial Judge, in defining two degrees of murder, inadvertently instructed the jury that the fact of killing with a deadly weapon, when admitted, raised the presumption or justified the inference that there was premeditation instead of malice, it was an erroneous instruction that could not be cured by any subsequent proposition that did not clearly remove from the minds of the jury the impression created by such instruction. (CLARK, J., dissenting). *Ibid.*

DEATH RESULTING FROM WRONGFUL ACT, Action for, 203.

DEBTORS AND CREDITORS OF INSOLVENT BANK:

Debtors in an insolvent bank are those who, at the appointment of a receiver, are liable to the bank for the payment of money, whether as principal or surety or whether the liability be matured or not; and creditors are those to whom the bank is indebted at the date of the appointment of the receiver, whether the debts are due or not. *Davis* v. *Industrial Manufacturing Co.*, 321.

DECLARATION OF RESULT OF ELECTION:

Where an act of the Legislature (chapter 87, Acts of 1887) authorizing towns along the line of a proposed railway to purchase its stock and issue bonds in payment therefor upon a vote of the majority of the qualified voters, required that the County Commissioners should ascertain and declare the result of such election and, upon an affirmative vote, to issue the bonds, a statement by the Commissioners that "after due canvass, the foregoing returns of election are correct and the said Board hereby approve the said returns" is not a declaration that a majority of the qualified voters favor the subscription. *Claybrook* v. *Commissioners*, 453.

DEED, 560:

1. The redelivery of an unregistered deed is not a reconveyance of the land, but only an estoppel on the grantee against setting up a title the evidence of which he has voluntarily destroyed. *Arrington* v. *Arrington*, 151.
2. A widow conveyed the portion of a tract of land allotted to her as dower by a deed purporting to be in fee-simple; the guardian of the heir, having procured an order of Court for the purpose, sold and executed a deed to the purchaser for the entire tract, embracing the dower portion, but with a reservation as follows: "Reserving the right of dower of the widow, etc., which has heretofore been sold and conveyed": *Held*, that the reservation in the deed by the guardian of the dower right "already conveyed" was a reservation only of what interest the widow had legally conveyed and was not a reservation of the fee-simple in the dower portion. *Bird* v. *Cruse*, 435.
3. Under "Connor's Act" (ch. 147, Acts of 1885), which provides that no conveyance of land or contract to convey shall be valid as against purchasers for value but from the registration thereof, actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered. *Maddox* v. *Arp*, 585.
4. A deed showing nothing on its face which either absolutely locates or points to any extrinsic evidence from which the beginning or any one of five succeeding corners can be ascertained is void for insufficiency of description. *Deaver* v. *Jones*, 649.

DEED, Construction of:

Under a deed to a woman "and her children" a child *en ventre sa mere* at the date of the conveyance will take, but not children born more than a year thereafter. *Heath* v. *Heath*, 547.

DEED, Probate of:

1. Where the certificate of probate of a mortgage merely recited that the mortgagee had "procured the same to be proved by this Court," the presumption is that the probate was properly taken. *Quinnerly* v. *Quinnerly*, 145.

2. Where an acknowledgment of a deed was made before an officer authorized to take it and was, in fact, in due form, the adjudication by the Clerk of the Superior Court of the county where the land lies that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," is sufficient although not following the words of the statute (*The Code*, §1246 [3]) that it is in "due form." *Deans* v. *Pate*, 194.

3. The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of a deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer." *Ibid.*

DEED OF TRUST:

1. A trust deed executed by one member of the firm in the firm name, with seal attached, is binding on the firm as a contract, though not as a deed. *Pipe and Foundry Co.* v. *Woltman*, 178.

2. A seal is not necessary to the due execution of a mortgage of personal property, and hence a seal affixed to the firm name signed to a deed of trust of personal property does not invalidate the conveyance. *Ibid.*

DELINQUENT TAX-PAYER:

1. A delinquent tax-payer is not deprived by garnishment proceedings "of due process of law" where he has had legal notice by listing his taxes and an opportunity to have the amount, if erroneous, or the valuation, if excessive, reduced. *Wilmington* v. *Sprunt*, 310.

2. An objection, if it were tenable, that a delinquent tax-payer (whose wages in the hands of his employer had been attached in garnishment proceedings) had not had his "day in court" could only be raised by the tax-payer himself and not by the garnishee. *Ibid.*

DELIVERY UNDER CONTRACT, What is, 349.

DEMAND, When necessary:

1. Where it appeared that defendant's intestate received money from the plaintiff agreeing to manage and lend it out for her and return it to her with six per cent. interest, and keep all that he got over six per cent. for his trouble as her agent, it was proper to charge the jury that if they found that the money was so received

by defendant's intestate the agency existed, and the defendant's intestate was responsible for the funds and that the statute of limitations would not run until after demand. *Lamb* v. *Ward*, 255.

2. Where, in an action by a principal against an agent for money due by the latter, the complaint does not allege a demand and refusal, a demurrer on that ground will not lie when in the answer, which contains the demurrer, a general denial of indebtedness is made and the statute of limitations pleaded. *Ibid.*

DEMAND AND REFUSAL:

The owner of a building on another's land cannot recover damages for withholding possession without first making a demand and being refused possession to enter and remove it. *Eastman* v. *Commissioners*, 524

DEPOSITS IN INSOLVENT BANK, 322.

DESCRIPTION IN DEED:

1. A deed showing nothing on its face which either absolutely locates or points to any extrinsic evidence from which the beginning or any one of five succeeding corners can be ascertained is void for insufficiency of description. *Deaver* v. *Jones*, 649.

2. Where, in a description in a deed, the point of beginning and the three last corners were monuments, and, in running in regular order by courses and distances the several lines between the point of beginning and the second monument, the line from the corner next preceding such monument to such monument passed outside the monument, the true rule was to run such line to the monument, disregarding course and distance, and not to survey the lines from the point of beginning in reverse order. *Norwood* v. *Crawford*, 513.

DEVISE:

1. A testator devised a life estate in a part of his lands to his wife, with remainder to the two children of a deceased son, provided that if said children should die "leaving no lawful heir (either or both of them) of their own body" the remainder should go to the children of another son and daughter of the testator. The children of the second son and daughter were provided for in another part of the will: *Held*, that the testator intended the share of his realty, set apart to the two children of the first son, as a provision, primarily, for each of them at all events during their lives, and in case both should leave issue them surviving, then to vest a moiety in the issue of each, but if only one should die leaving a child or children such surviving issue to take the whole. *Dunning* v. *Burden*, 33.

2. A devise of real and personal estate to J. in trust for E. (a married woman), with no limitations over and no duties to be performed by the trustee, is a dry, naked or passive trust and vests the legal title in E. under the statute of uses. In such case E. is entitled to the possession of the personal property. *McKenzie* v. *Sumner*, 425.

DISCHARGE OF DEBTOR UNDER ARREST AND BAIL:

1. A defendant held to arrest and bail can be discharged only (1), before trial, by giving bond or making deposit; section 298 of *The Code;* (2), at the trial, by the issue of fraud or allegations of tort being found in his favor; section 316 of *The Code;* (3), after (or before) judgment against him, by payment or giving notice and surrendering all property in excess of fifty dollars; section 2972 of *The Code. Fertilizer Co.* v. *Grubbs*, 470.

2. A debtor held to arrest and bail was improperly discharged upon an affidavit that he had made an assignment of all his property for the benefit of creditors and that he was, at the date of the affidavit, insolvent and not worth more than the exemptions allowed him by law as set apart to him. *Ibid.*

DISOBEDIENCE OF RULES BY EMPLOYEE:

While a brakeman is not culpable for exposing himself to danger in disregard of the rules of the company but in obedience to the orders of the conductor in charge of the train, yet the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not otherwise be coupled did not justify him in doing so several months later when under the control of another conductor who gave no such order. *Mason* v. *Railroad*, 718.

DOCKETING JUSTICE'S JUDGMENT, 558.

DOWER, Contingent right of:

1. The privy examination of a wife of a grantor of land is not necessary to bar the contingent right of dower in land where the marriage took place in 1857 and the land was acquired in 1861. *Dixon* v. *Robbins*, 102.

2. Where the only interest that a *feme* defendant in an action by the grantee of her husband and herself to recover the land is her contingent right of dower, her failure to sign the deed or to be privily examined will not affect the right of the plaintiff to recover. *Deans* v. *Pate*, 194.

DRAINAGE OF LOWLANDS:

1. Chapter 253, Acts of 1889, concerning the drainage of lowlands, does not expressly repeal section 1298 of *The Code* providing for the

duty of commissioners, but leaves in operation such of the provisions as are not repugnant to such Act of 1889. *Worthington* v. *Coward*, 289.

2. Upon the hearing of the report of commissioners appointed to lay off a ditch for draining lowlands it was error in the Clerk to refuse to hear witnesses offered by parties excepting to the report, on the ground that he could not legally do so. *Ibid.*

3. On appeal from the judgment of the Clerk upon the report of commissioners appointed to lay off ditch for drainage of lowlands the Judge could set aside the report either for cause or in his discretion, if, in his opinion, the ends of justice could be subserved by that course. *Ibid.*

DRUNKENNESS: See "INTOXICATION."

EDUCATIONAL FUND, 313.

EJECTMENT: See "ACTION TO RECOVER LAND."

ELECTION, To ascertain will of voters for issue of bonds, 453.

ELECTRIC WIRES ON STREET:

It is the duty of a corporation or others using the streets of a city, by permission of the municipal authorities, for purposes of private gain, to so conduct their business as not to injure persons passing along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy. *Haynes* v. *Gas Co.*, 203.

EMBEZZLEMENT:

To "embezzle" means not only to "appropriate to one's own use," but also to "misappropriate fraudulently"; therefore, where an indictment charged that defendant "did convert to his own use and embezzle" a check, an instruction that defendant was guilty if he received the check and misappropriated it fraudulently, whether for his own benefit or not, was proper. *State* v. *Foust*, 842.

ENDORSEMENT:

1. Where the payee (whether original or by a previous indorsement) of a note assigns or transfers it by indorsement he becomes simply an indorser and, by section 50 of *The Code*, liable as a surety unless by the terms of the assignment he limits his liability; if he intends to transfer the title only he should use the words "without recourse" or other phrase of similar import. *Davidson* v. *Powell*, 575.

2. An indorsement, "I assign over the within note to P.," does not limit the indorser's liability as such. *Ibid.*

3. While, if the note be in the hands of the original payee, an indorsement may be shown to have been upon certain conditions, yet a *bona fide* holder for value, before maturity and without notice, is not affected by any equities existing between the original parties, and the same rule applies between the last payee and all subsequent indorsers. *Ibid.*

4. The burden of proof is upon an indorser to show any agreement by which his liability was restricted. *Ibid.*

ENGINEER OF TRAIN:

It is the duty of a railroad company in running its trains to keep a lookout on its track in order to discover and avoid any obstructions that may be encountered thereon, and if by reasonable watchfulness on the part of the engineer he might discover a person on the track in a perilous position and apparently insensible to danger, in time to avoid injury, and the engineer fails to keep such lookout and by reason thereof injury results, the railroad company is guilty of negligence for which an action may be maintained, provided that the person injured has not been guilty of contributory negligence. *Smith* v. *Railroad*, 728.

ENTRY OF LANDS COVERED BY NAVIGABLE WATER:

Lands covered by navigable water can be entered only by the owner of the land abutting thereon. *Zimmerman* v. *Robinson*, 39.

ENCUMBRANCES:

Where one contracts for the purchase of land without any agreement for a warranty of title and, thereafter and before the execution of a deed encumbrances are discovered, he cannot be compelled to take the defective title or to pay the bonds given for the price of the land, for an agreement to take a deed without warranty is not a waiver of the right to demand a clear title. *Leach* v. *Johnson*, 87.

EQUITY IN LAND SUBJECT TO EXECUTION:

One who has purchased lands within the "Cherokee Land" boundary, and has paid for them and is entitled to a grant on payment of the grant fees, has a vested equitable estate therein which is subject to execution. *Wilson* v. *Deweese*, 653.

EQUITY OF REDEMPTION:

The owner of the equity of redemption in land may recover as against a trespasser. *Arrington* v. *Arrington*, 116.

EQUITABLE DEFENCES, 121.

EQUITABLE CONVERSION:

1. Money directed by a will or other instrument to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and the subsequent devolution and disposition thereof will be governed by the rules applicable to that species of property. *Benbow* v. *Moore*, 263.
2. Where a testator provided in his will for the sale of his lands to a certain person at a price to be ascertained by a prescribed method and for the division of the proceeds among his nieces, there was an equitable conversion of the land at the testator's death, in 1860, and the share of a niece then married became a chose in action and vested in the husband at the time, *jure mariti*, although the proceeds were not actually received by him until after the adoption of the Constitution of 1868. *Ibid.*
3. Where, in such case, the husband invested the proceeds of the chose in action, so reduced into his possession, in land without any special agreement to invest and hold for the benefit of the wife, there was no resulting trust in her favor. *Ibid.*
4. The legacy, notwithstanding an adverse claim was unsucessfully made by another to the land so ordered to be sold, was the qualified property of the husband and upon its reduction into possession the title to it related back to the date of the testator's death and not to the time of its actual reduction. *Ibid.*

ESTOPPEL:

1. Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same. *Branch* v. *Ward*, 148.
2. In an action to recover land a defendant who went into possession under the plaintiff's grantor, as his agent, is estopped to deny plaintiff's title. *Cooper* v. *Axley*, 643.
3. One who enters into a tract of land under a written contract of purchase is a tenant at will of the bargainor, and is estopped, from denying the latter's title in an action of ejectment against him to recover possession. *Wilkins* v. *Suttles*, 550.
4. If, after an estoppel has arisen, the existence of the contrary fact is averred by one of the parties, the other may show it by pleading it if it be not already apparent on the record; but if, having the opportunity to do so, he fail to plead and rely upon it, and answer to the fact and again put it in issue, the estoppel, when

offered in evidence, loses its conclusive character and may be repelled by opposite proof. Where, however, the pleadings are general, as in actions of ejectment, etc., the party having no opportunity to plead it, the estoppel retains its exclusive character, and the jury must find according to it. *Ibid.*

ESTOPPEL BY DEED, 567:

1. Since a *feme covert* may, with the consent of her husband, convey her land "as if she were single," a conveyance by her estops her from afterward acquiring by grant from the State riparian rights incident to the land conveyed, and even if she subsequently entered under another title lapping upon the boundaries of her own conveyance it was necessary in order to effect a disseizin that she should occupy the interference and to mature title that the occupation should continue seven years. *Zimmerman* v. *Robinson*, 39.
2. Any deed made to her subsequently would feed the estoppel, and she could only have availed herself of it by actual occupation of the land previously conveyed. *Ibid.*
3. The redelivery of an unregistered deed is not a reconveyance of the land, but only an estoppel on the grantee against setting up a title the evidence of which he has voluntarily destroyed. *Arrington* v. *Arrington*, 151.
4. The fact that a partition of lands has been made among devisees does not estop a legatee from enforcing his claim against the land, except as against purchasers in good faith for value and without notice. *Ibid.*

EVIDENCE:

1. The intent with which a breach of trust is committed is immaterial; and hence, where, in the trial of an action for a breach of trust, aided by the ancillary remedy of arrest and bail, the plaintiffs, in reply to the testimony of defendants that they intended no breach of trust, were permitted to introduce evidence of other breaches of trust by the defendants: *Held*, that such evidence was harmless and its admission, upon the question of intent only, was not error. *Boykin* v. *Maddrey*, 89.
2. Where one party to a contract relies upon a renunciation of it by the other the burden is upon him to show by positive and unequivocal proof, not only that the other party abandoned the contract, but that he himself accepted the renunciation. *Sitterding* v. *Grizzard*, 108.
3. Where, in the trial of an action for an injury resulting in death and caused by the alleged negligence of defendant, it appeared that the deceased, an intelligent boy ten years old, while walk-

ing on the sidewalk of the street, grasped a "live" guy wire hanging to the street and belonging to the defendant, and was killed by the contact, and there was no visible indication that the wire was charged with electricity: *Held*, that the trial Judge should have told the jury that there was no evidence of contributory negligence on the part of the deceased. *Haynes* v. *Gas Company*, 203.

4. Negligence being a failure of duty, proof that a "live wire" carrying a deadly current of electricity was hanging over and lying upon a sidewalk, and that it had been placed above the street by and was the property of the defendant corporation and was under the control of the servants of the latter, and that by contact with such wire a person, having a right to be on the street, was killed, constituted a complete *prima facie* case of negligence, and the burden was put upon the defendant to show that the wire was not down through any negligence of itself or its servants or agents. *Ibid.*

5. In the trial of an action for a breach of a guaranty that a certain stock would be worth par within a year from date of the contract, evidence of the market value of such stock after the lapse of the year was properly excluded. *Times Co.* v. *Steel and Iron Co.*, 224.

6. Where a witness for plaintiff stated that the defendant's intestate had received money from plaintiff to manage for her it was not competent to ask him, on cross-examination, if he (the witness) had not stated to others that the money had been repaid; and, on the denial by witness of such statement, to prove that he had made it, for, the evident purpose of defendant (upon whom the burden of proving payment rested) being to prove such payment by the witness, the defendant made the latter, in some degree, *his* witness and was bound by his answer to the question. *Lamb* v. *Ward*, 255.

7. Notes of defendant's intestate in his handwriting and payable to plaintiff, found among the papers of the former, were not admissible to show payment to plaintiff, there being no evidence that they were ever in the possession of the latter. *Ibid.*

8. Parol evidence is admissible in the trial of an action on a written contract to explain the meaning of abbreviations of words and figures contained therein. *White* v. *McMillan*, 349.

9. The existence of near relationship between parties to a suspicious transaction often constitutes additional evidence of fraud for the jury, but, in the trial of an action to set aside a conveyance on the ground of fraud, it was error to instruct the jury that proof of the existence of near relationship between a grantor and

grantee named in a deed amounts to a *prima facie* showing of fraud so as to make it incumbent on the parties upholding the deed to offer affirmative testimony to show good faith or submit to a verdict on an issue of fraud. *Bank* v. *Bridgers*, 383.

10. The matters appearing in transcripts of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence before him by virtue of the provisions of chapter 501, Acts of 1891, which was passed pending the suit in which they were offered, but before the account was stated. *Wallace* v. *Douglas*, 450.

11. In a suit by the holder of drafts against a United States Marshal who accepted drafts drawn on him by three Deputy Marshals payable when he, the Marshal, should receive funds to the use of said deputies, transcripts of such part of papers on file and records of the Treasury Department as contained the accounts and vouchers of the Marshal relating to such deputies, are admissible in evidence to show how much was allowed to the defendant for the Deputy Marshals and are not objectionable as being fragmentary. *Ibid.*

12. Though plaintiff in an action for land fails to show a grant from the State, or adverse possession for sufficient time to bar the State, he may avail himself of the subsequent introduction by defendant of a patent to prove adverse possession for such period as will bar defendant. *Hamilton* v. *Icard*, 532.

13. The burden of proof is upon an indorser to show any agreement by which his liability is restricted. *Davidson* v. *Powell*, 575.

14. In the trial of an indictment for obtaining money under false pretenses it is competent, in order to show the *scienter* and intent, to prove other similar transactions by the defendant. *State* v. *Walton*, 783.

15. In the trial of an indictment for obtaining money under false pretenses by inducing the County Treasurer to cash an order represented by the defendant as being genuine, evidence offered by defendant as to the stub-book kept by him in the Register of Deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true. *Ibid.*

16. Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under section 1338 of *The Code*, testify to and explain them before Courts and juries (SHEPHERD, C. J., dissenting). *State* v. *Behrman*, 797.

17. A paper-writing purporting to be a contract of marriage, and to be signed by the contracting parties at the time of the alleged marriage, is admissible, in the trial of an indictment for fornication and adultery, not only in corroboration of a witness who testified to the facts, but also as substantive evidence to prove the marriage. *Ibid.*

18. Where, in the trial of an indictment for fornication and adultery, a photograph of defendant was introduced, on the back of which, signed with his name, were words purporting to be a marriage to his wife and indicating that the one to whom the message was addressed was married, and the alleged wife (prosecuting witness) testified that the writing was the defendant's and that the photograph had been sent to her: *Held*, that such writing was admissible as an acknowledgment of marriage. *Ibid.*

19. Where, in the trial of an indictment for fornication and adultery, the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and seal of the official minister of such foreign country, although inadmissible as a record or an independent declaration of the rabbi it was competent as a part of the *res gestæ* to support the testimony of the prosecuting witness as to the fact of the marriage. *Ibid.*

20. Where a witness is impeached, either by contradictory testimony, on cross-examination, or by attack upon his character, his declarations to a third person, made soon after the transaction, may be stated by himself and afterwards shown by such third person in way of corroboration. *State* v. *Staton*, 813.

21. A witness may be compelled, at the instance of a party who is examining him, to inspect a writing which is present in court and in his own handwriting, or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates. *Ibid.*

22. Where a writing relates to collateral matters and a defendant on trial could derive no benefit from compelling a witness for the prosecution to inspect it, the refusal of the Court to compel witness to refresh his indistinct recollection of the matter is a harmless error and not reversible. *Ibid.*

23. Evidence which only raises a conjecture or suspicion of the guilt of one charged with an offence, but does not warrant a reasonable conclusion of his guilt, ought not to be submitted to the jury. *State* v. *Bridgers*, 868.

24. Where, on a trial for larceny, the prosecuting witness testified that, on his refusing to sell the defendant any mule shoes on credit, defendant sat down on a keg containing some, and after rattling the shoes for a while with his hand went out of the store with his right hand in his pocket; that he, the witness, suspected defendant of taking some shoes, but did not know whether any were taken or not; and defendant testified that he bought mule shoes which were soon afterwards found in his possession from one M., who testified that he did not remember selling them to the defendant, but might have done so, as there were many people about his store that day: *Held*, that the evidence raised only a conjecture or suspicion of defendant's guilt, and did not reach the dignity of legal evidence. *Ibid.*

25. Where the testimony of a witness (even when he is a party to the action) is impeached he may be corroborated by showing that he has made similar statement about the transaction testified to—such corroborating testimony not being intended to prove the principal facts to be established, but to help the credibility of the witness just as evidence of his good character, etc. *Wallace* v. *Grizzard*, 488.

EXCLUSIVE PRIVILEGES:

The legislative charter of a street-railway company granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities of a town," gave such authorities no power to grant *exclusive* privileges to the railway company. (*Quære*, whether the Legislature has the right to authorize a city to grant such exclusive privileges). *Railway* v. *Railway*, 725.

EXEMPTIONS:

Where a debtor arrested and imprisoned for fraud did not tender the oath required by sections 2968–2972 of *The Code* to the effect that he had not property of the value of fifty dollars, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by ch. 27, Vol. II of *The Code*, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was, at the date of the affidavit, insolvent and not worth more than the exemptions allowed him by law as set apart to him. *Fertilizer Co.* v. *Grubbs*, 470.

EXONERATION:

A married woman, who has mortgaged her land as security for her husband's debt, has the rights of a surety as to the liability thus imposed on her property, and is entitled to have all of her husband's estate included in the mortgage exhausted to the exoneration of hers; she may also object to the diversion of funds that should have been applied on the debt to her exoneration, if made without her consent. *Weil* v. *Thomas*, 197.

EXPRESS CHARGE ON MARRIED WOMAN'S SEPARATE ESTATE:

1. A note signed by husband and wife containing a clause, "and the said husband hereby consents that the above note shall be a charge on the separate estate of his said wife for the payment of this note," expressly charges the separate personal estate of the wife. *Jones* v. *Craigmiles*, 613.
2. In the case of an express charge it is not necessary that it should appear that the consideration is beneficial to the wife nor that the separate estate should be specifically described. *Ibid.*
3. To make a contract of husband and wife an express charge upon her separate personal estate it is unnecessary that the assent of the husband shall be signified by a separate clause, his execution of the paper jointly with his wife being a sufficient compliance with the law in this respect. *Ibid.*
4. It is necessary in an action to enforce an executory contract of a married woman, as a charge upon her separate estate, that the complaint should describe the property to be charged. *Ibid.*
5. In an action to have the contract of a married woman declared a charge upon her separate estate equity will, in proper cases, lend its aid by the appointment of a receiver or by other interlocutory orders necessary to protect the rights of the creditors. *Ibid.*

EXTINGUISHMENT OF DEBT:

The purchase by a judgment creditor, at his execution sale, of property levied upon as belonging to the judgment debtor, for a sum sufficient to pay the debt, interest and costs, was a discharge and extinguishment of that particular debt, notwithstanding the property so sold was afterwards, in a suit by the owner against the creditor for damages, adjudged to be the property of the former, for, although a new cause of action thereupon arose in favor of the judgment creditors against the judgment debtor, it did not revive the judgment debt which had been satisfied. *Johnson* v. *Gooch*, 62.

FAILURE OF RAILROAD COMPANY'S ENGINEER TO SIGNAL APPROACH OF TRAIN, 697.

FALSE PRETENSE:

1. To be indictable the false pretense must be of some existing fact in contradistinction alike from a mere promise or a mere opinion; therefore,
2. Where defendant obtained a bottle of medicine from another by false representations that it was too strong to be applied on the face of such other, he cannot be held guilty of obtaining goods under false pretenses. *State* v. *Daniel*, 823.
3. In the trial of an indictment for obtaining money under false pretenses it is competent, in order to show the *scienter* and intent, to prove other similar transactions by the defendant. *State* v. *Walton*, 783.
4 In the trial of an indictment for obtaining money under false pretenses by inducing the County Treasurer to cash an order represented by the defendant as being genuine, evidence offered by defendant as to the stub-book kept by him in the Register of Deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true. *Ibid.*

FEES, Non-payment of for transcript, 282.

FELONIOUS INTENT:

1. While secrecy is usually a part of the evidence of felonious intent it is not such an essential accompaniment of larceny as to require the State, in every instance, to prove an attempt to conceal the taking. *State* v. *Hill*, 780.
2. Where, in the trial of an indictment for larceny, there was conflicting evidence as to the manner in which the defendant took and carried from a store a piece of meat, it was proper in the Court to leave the question of felonious intent to the jury. *Ibid.*

FEME COVERT (see, also, "MARRIED WOMAN"):

1. Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same. *Branch* v. *Ward*, 148.
2. Where the only interest that a *feme* defendant in an action by the grantee of her husband and herself to recover the land is her contingent right of dower, her failure to sign the deed or to be privily examined will not affect the right of the plaintiff to recover. *Deans* v. *Pate*, 194.

3. A married woman, who has mortgaged her land as security for her husband's debt, has the rights of a surety as to the liability thus imposed on her property, and is entitled to have all of her husband's estate included in the mortgage exhausted to the exoneration of hers; she may also object to the diversion of funds that should have been applied on the debt to her exoneration, if made without her consent. *Weil* v. *Thomas*, 197.

FINE AND PENALTY, Interchangeable terms, 873.

FIRE LIMITS:

1. Municipal corporations may, if there is no law to the contrary, prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe; and, it seems, this may be done by or through the delegated authority of the Legislature, even where the enforcement of the law or ordinance causes a suspension of work previously contracted for. *State* v. *Johnson*, 846.

2. Where the Legislature has granted authority to a municipality to supervise or prevent the replacing of a roof with another of shingles, instead of constructing one of material less liable to destruction, an ordinance forbidding the owner of a building within a prescribed fire limit to alter or repair a wooden building within such limit, without the consent of the Board of Aldermen, is not unreasonable, and will be upheld. *Ibid.*

FLOATING LOGS:

In an action by a county to enjoin defendant from floating logs in certain streams and to recover damages for injury done to county bridges over such streams, on a motion by plaintiffs to continue a temporary injunction, it appeared that there was a serious issue as to whether or not the streams were "floatable"; that defendant had a large number of logs that would become worthless if not floated, and that an injunction would stop its mill, to the great detriment of many people, and so as to damage defendant $100 per day: *Held*, that it was proper to permit defendant to give bond sufficient to cover all damages that would probably be sustained by plaintiffs and refuse to continue the injunction. *Commissioners* v. *Lumber Co.*, 505.

FORECLOSURE OF MORTGAGE, 366:

Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. *Wooten* v. *Sugg*, 295.

FOREIGN CORPORATION:

The method of mailing process to the Sheriff of the county and State where a non-resident defendant resides, to be served upon him (as provided by ch. 120, Acts of 1891), is optional and not exclusive of service by publication in cases in which this last is proper. *Mullen* v. *Canal Co.*, 8.

FOREIGN LAWS:

1. Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under section 1338 of *The Code*, testify to and explain them before Courts and juries (SHEPHERD, C. J., dissenting). *State* v. *Behrman*, 797.
2. Where, in the trial of an indictment for fornication and adultery, the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and seal of the official minister of such foreign country, although inadmissible as a record or an independent declaration of the rabbi, it was competent as a part of the *res gestæ* to support the testimony of the prosecuting witness as to the fact of the marriage. *Ibid.*

FORMA PAUPERIS, Appeal in, 830.

FORMER ADJUDICATION:

Where a lease by A. and wife of the land of A. provided that it should terminate upon the sale of the land by the lessors and A. conveyed his interest in the land to his wife for life with remainder over, and in a suit by the wife against the lessee for possession upon the ground that the conveyance by the husband terminated the lease it was adjudged that the lease had not been determined, such adjudication could not affect the rights of a subsequent purchaser of the wife's life estate in a suit for possession upon the ground that the sale by both the husband and wife of their interest in the land had terminated the lease. *Aydlett* v. *Pendleton*, 1.

FRAUDULENT CONVEYANCE:

The existence of near relationship between parties to a suspicious transaction often constitutes additional evidence of fraud for the jury, but, in the trial of an action to set aside a conveyance on the ground of fraud, it was error to instruct the jury that proof of such relationship between the grantor and grantee in a deed amounts to a *prima facie* showing of fraud so as to oblige the parties upholding the deed to offer affirmative testimony to show good faith or submit to a verdict on an issue of fraud. *Bank* v. *Bridgers*, 383.

FRAUDULENT INTENT:

The intent with which a breach of trust is committed is immaterial. *Boykin* v. *Maddrey*, 89.

FRIVOLOUS ANSWER:

In an action begun as a proceeding for the re-allotment of homestead, but which, by consent of the judgment creditor and debtor and the mortgagees of the latter, had become one for the foreclosure of mortgages, the plaintiff caused the wife of the judgment debtor to be made a party defendant for the purpose of enabling her to assert any rights she might have; she filed an answer which tended to revive issues which had been finally adjudicated between plaintiff and her husband instead of setting up any rights of her own: *Held*, that such answer was immaterial and was properly disregarded by the Judge below. *Vanstory* v. *Thornton*, 375.

"FROM DATE," Meaning of, 224.

GARNISHMENT:

1. Where a city charter provides that the Tax-collector shall have all the powers vested by law in Sheriffs or Tax-collectors for the collection of taxes due the State, such City Tax-collector has the right to collect by garnisheeing any one indebted to a delinquent tax-payer where no tangible property can be found belonging to the latter sufficient to satisfy the taxes. *Wilmington* v. *Sprunt*, 310.

2. The grant of the same authority to a City Tax-collector as is possessed by a Sheriff in collecting taxes provides for a continual conformity as the general law is from time to time modified; therefore, where a city charter adopted in 1877 gave to its Tax-collector the same powers as to the collection of taxes as Sheriffs had, and the power of the Sheriff to collect by garnishment at that time only extended to poll-taxes but was, by chapter 137, Acts of 1887, enlarged so as to extend to all taxes, the authority of the City Tax-collector was likewise increased. *Ibid.*

3. A delinquent tax-payer is not deprived by garnishment proceedings "of due process of law" where he has had legal notice by listing his taxes and an opportunity to have the amount, if erroneous, or the valuation, if excessive, reduced. *Ibid.*

4. An objection, if it were tenable, that a delinquent tax-payer (whose wages in the hands of his employer had been attached in garnishment proceedings) had not had his "day in court" could only be raised by the tax-payer himself and not by the garnishee. *Ibid.*

5. It is in the discretion of the Court whether notice of proceedings for the examination of persons indebted to a judgment debtor shall be given to the debtor. *Ibid.*

GOOD-WILL IN TRADE, 647.

GRANT OF PUBLIC LANDS:

1. Where a grant has been issued in strict compliance with the law rights of property have been acquired which cannot be taken away, even by the State, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain. *State* v. *Spencer*, 770.

2. The decision of the Board of Shell-fish Commissioners fixing the location of the public grounds under the provisions of ch. 119, Acts of 1887, is final where there was no protest or appeal and in the absence of fraud or mistake; and an entry and grant of a natural oyster bed not included in the boundaries fixed by the Board cannot be vacated on the ground that such bed was not subject to entry. *Ibid.*

GRANTEE IN ESSE:

Under a deed to a woman "and her children" a child *en ventre sa mere* at the date of the conveyance will take, but children born more than a year thereafter will not. *Heath* v. *Heath*, 547.

GRANTEE:

A grantee of land cannot recover damages incident to the entry thereon by a railroad company—such as destruction of the crops, etc. *Liverman* v. *Railroad Co.*, 692.

GRANTS, Conflicting:

In an action by a junior grantee against a senior grantee to recover possession of land included in both grants by reason of a lappage, it appeared that plaintiff and his predecessors were in possession of a portion of the lappage for more than seven years before defendant entered on, and actually occupied, another portion of it; the only evidence of any attempt by defendant to exercise dominion over the lappage before such entry was that her tenants entered at intervals and cut timber for rails and removed pine straw from it: *Held*, that it was error to submit to the jury the question as to whether defendant, during such seven years, occupied and used any portion of the lappage "for any purpose such land could be used for," it not having been shown that the land was unfit for cultivation and had been used for the statutory period for the only purpose for which it was available. *McLean* v. *Smith*, 356.

HIGHWAYS:

1. Ch. 354, Acts of 1891, providing for working the highways of certain counties and amending the general law as affecting them, empowers "the Board of Township Trustees and the Board of County Commissioners, as hereinafter set forth in this chapter," to lay out public roads, and repeals all inconsistent laws, but does not designate how the joint authority is to be exercised: *Held*, that the provision for the concurrent authority is inoperative and procedure afforded by section 2038 *et seq.* of *The Code* gives jurisdiction to the County Commissioners to lay out roads in such counties without the co-operation of the Township Trustees. *Russell* v. *Leatherwood*, 683.
2. Where, on appeal from the order of the County Commissioners establishing a public road, the Court read the petition to the jury and charged that the termini of the road were as set out in the petition, it was not error to refuse further instructions as to the points named as termini. *Ibid.*

HOMESTEAD:

1. A mortgage of lands by one indebted at the time bars any homestead right therein without the joinder and privy examination of the wife, if the homestead had not been allotted and there were no docketed judgments upon which the homestead could be allotted. *Dixon* v. *Robbins*, 102.
2. The plaintiff in an action to recover land which, together with two other tracts, had in 1879 been allotted to defendant's father as a homestead, claimed under a Sheriff's deed dated December 22, 1890, and recorded January 21, 1891, the Sheriff having sold under an execution against the defendant's father, to whom, and at whose instance, upon a re-allotment of the homestead, other lands were allotted by commissioners; the defendant claimed under a deed from her father dated January 18, 1883, and recorded March 13, 1891; the plaintiff had no actual or constructive notice at the sale that the defendant was in possession or that she claimed the land; the judgment debtor laid no claim to the land as a part of his homestead: *Held* (1), that, under "Connor's Act" (ch. 147, Acts 1885), providing that no unregistered conveyance of land shall pass any property as against purchasers for value, the plaintiff's deed takes precedence of the defendant's deed; (2), the *locus in quo* was, as to the creditors of the defendant's grantor, simply former homestead land as to which the grantor had waived his homestead in the constitutional way by deed with the prescribed formalities, and was subject to execution for the grantor's debts. *Allen* v. *Bolen*, 560.

3. On March 18, 1876, a judgment was docketed against G. and a homestead allotted on July 31, 1876; she conveyed it to H. December 29, 1881, and died June 2, 1891: *Held*, in a proceeding by G.'s administrator to sell the land for assets to pay the judgment, that the lien of the judgment continued so as to be a charge upon the land and that the administrator was entitled to sell it to pay the judgment and costs of its enforcement. *Blythe* v. *Gash*, 659.

HOMESTEAD, Effect of allotment of on judgments:

Where a homestead was allotted to a judgment debtor on judgments docketed in 1873–'75 the lien of the judgments was not barred by the lapse of time in 1891. *Leach* v. *Johnson*, 87.

HOMESTEAD, Assignability of, 377:

1. The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner* v. *Batts*, 496.

2. A judgment debtor, being the owner at the time of the docketing of a judgment against him of White Acre, sold and conveyed it to another and received, in part payment, a conveyance of Black Acre; upon the issuance of execution he selected Black Acre, which was worth less than $1,000, and insisted upon his right to have the deficiency made up out of White Acre: *Held*, that he had the right to select his homestead in any land which he owned at the date of docketing the judgment and the deficiency, after the allotment of Black Acre, should be made up to him out of White Acre. *Ibid.*

3. In such latter case the fact that the homesteader was an unmarried man does not affect his right to the homestead. *Ibid.*

HUSBAND AND WIFE, Contract of, 613:

1. Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same. *Branch* v. *Ward*, 148.

2. Where a husband with his own money purchases and improves land, putting the title in the wife, there is no resulting trust in favor of the husband, but a gift to the wife, both of the land and the improvements, is presumed from the relation of the parties. *Arrington* v. *Arrington*, 116.

INDEX OF REGISTERED DEED:

The efficacy of a deed actually registered is not impaired by the failure of the Register of Deeds to index it. *Davis* v. *Whitaker*, 279.

INDICTMENT:

For affray, 840.

For arson, 813.

For attempt to burn residence, 844.

For carrying concealed weapon, 850.

For disposing of mortgaged property, 812.

For embezzlement, 842.

For failure to work on public road, 832.

For false pretense, 783, 823.

For fornication and adultery, 797.

For larceny, 780, 868.

For murder, 879, 885, 909.

For perjury, 827.

For retailing without license, 873.

For violation of town ordinance, 787.

INDICTMENT, Generally:

1. Where, after verdict and judgment, the Court set the same aside and granted a new trial, it was allowable to put the defendants upon trial on a new indictment found at the same term, upon the same testimony of the same witnesses, the two bills being treated as several counts in the same indictment. *State* v. *Lee*, 844.
2. Where, upon an indictment containing two counts, one of which is good, there is a general verdict of guilty, the verdict will be presumed to be on the valid count and will support the judgment. *Ibid.*
3. Where a verdict of guilty was set aside in the discretion of the Judge and a new trial was heard upon another bill, there was nothing to support a plea of former conviction, for if the first indictment was defective so as to warrant arrest of judgment the defendants cannot be considered as having been in jeopardy. *Ibid.*
4. Where an indictment is of doubtful validity it is proper practice to send a second bill at the same term at which the first stood for trial. *Ibid.*

INJUNCTION, 670:

1. Where a plaintiff claiming an equitable interest in land and seeking to restrain its sale under a deed of trust asks for an account and establishes a *prima facie* case which is not rebutted by the defendant, "a serious controversy" has arisen, which entitles the plaintiff to an injunction and account. *Faison* v. *Hardy*, 58.

2. A party seeking an interlocutory injunction is not required to establish his right with the same precision and certainty that is necessary on the final hearing; therefore, while on the trial of an issue as to the existence of a parol trust the plaintiff must produce strong and convincing proof of an agreement amounting to a trust existing at the time, the rule does not apply to the intensity of proof to be offered in the prosecution of a remedy ancillary to the real object of the action. *Ibid.*

3. Where a purchaser of land executed a trust deed to secure the purchase-money under which the trustee advertised the land for sale, and F. brought an action to restrain the sale and for an accounting, alleging that there was a parol trust in the land whereby he became the owner of the equity of redemption therein, and claiming that the notes were entitled to credits other than had been given, and his averments were corroborated by affidavits but denied by answer of the defendant and affidavits in support thereof: *Held*, that the Court properly granted an interlocutory injunction. *Ibid.*

IMPEACHING TESTIMONY, 277:

Where a witness is impeached, either by contradictory testimony, on cross-examination, or by attack upon his character, his declarations to a third person, made soon after the transaction, may be stated by himself and afterwards shown by such third person in way of corroboration. *State* v. *Staton*, 813.

INJUNCTION:

1. Upon an application for an injunction and receiver it is not necessary for the Judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. *Bank* v. *Bridgers*, 381.

2. Where the insolvency of a trustee in a deed of assignment was questioned and it was positively alleged by the plaintiff, and the defendants simply allege their belief that he was not insolvent; and, upon being required to give bond, the trustee refused so to do: *Held*, that it was proper to appoint a receiver to take charge of the assigned estate pending the litigation. *Ibid.*

3. The requirement of section 341 of *The Code*, that a plaintiff shall give an undertaking before an injunction can be granted, is mandatory. *James* v. *Withers*, 474.

4. When proper to refuse injunction upon bond being given to cover all damages that plaintiffs might sustain. *Commissioners* v. *Lumber Co.*, 505.

5. Where S., a druggist, in selling out a part of his stock to plaintiffs, agreed not to engage in the drug business in a certain town

either directly or indirectly and afterwards sold the remainder of his stock to defendant D., who gave a mortgage upon the stock to secure the purchase price, and conducted a drug business in the town: *Held*, in an action to enjoin D. from conducting such business, that he is not an agent of S., the mortgagee, in the sense of conducting a business forbidden by the contract between S. and plaintiffs, and cannot be enjoined from carrying it on. *Reeves* v. *Sprague*, 647.

INJURY RESULTING IN DEATH, 203, 728.

INJURY TO LANDS BY RAILROAD:

1. Where the enjoyment of an easement by a railroad in the lands of a land-owner has the effect of injuring adjoining lands of the owner damages are recoverable for such injury. *Liverman* v. *Railroad*, 692.
2. In condemnation proceedings there can be no recovery of damages incident to the entry—such as for destruction of crops and the like—nor for use and occupation before plaintiff acquired title, for these are personal to the owner and do not pass to the grantee. *Ibid.*

INSOLVENT BANK, 343.

INSOLVENT CORPORATION:

1. While in the statutes relating to the winding up of the affairs of an insolvent corporation no specific directions are given as to mutual debts and credits, yet under sections 669 and 670 of *The Code*, which provide that the Court shall make such orders as justice and equity shall require and direct how claims shall be approved, the claims of an insolvent bank and its debtor, who is also a depositor, may be adjusted. *Davis* v. *Industrial Manufacturing Co.*, 321.
2. Debtors to an insolvent bank are those who, at the appointment of a receiver, are liable to the bank for the payment of money, whether as principal or surety or whether the liability be matured or not; and creditors are those to whom the bank is indebted at the date of the appointment of a receiver, whether the debts are due or not. *Ibid.*
3. After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver's right to set-off claims the bank may have against the creditor, and if the assignee of the claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. *Ibid*
4. The effect of the insolvency of a bank closing its doors and stopping its business is to make all its deposit accounts and certifi-

cates of deposits at once become due without demand or notice, and in settling its affairs equity and justice require that the receiver shall deduct from the amount due a creditor all sums for which he is a debtor and shall allow a debtor credit for all sums for which he is creditor. *Ibid.*

5. Where one of several indorsers of a note of an insolvent debtor to an insolvent bank is also a creditor of such bank he is entitled to avail himself of his claim in settlement of his proportionate part of his liability on such note, which will be less or greater according to the solvency or insolvency of the other indorsers. *Ibid.*

INSOLVENT DEBTOR:

Where a debtor arrested and imprisoned for fraud did not tender the oath required by sections 2968–2972 of *The Code* nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by ch. 27, Vol. II of *The Code*, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was, at the date of the affidavit, insolvent and not worth more than the exemptions allowed him by law as set apart to him. *Fertilizer Co.* v. *Grubbs*, 470.

INSOLVENT ESTATE:

1. One who, with actual notice of the insolvency of a decedent's estate, purchased land from another who, with like notice, had bought from the devisee, is not protected by section 1442 of *The Code*, but the land may be subjected to the payment of the indebtedness of the estate. *Arrington* v. *Arrington*, 151.
2. One who, in good faith, purchases property upon credit, at a fair price, from an insolvent debtor, is a purchaser for value; therefore, one who, after two years from the grant of letters, for value and without notice of fraud in the devisee, purchases land from the latter and at once reconveys it as security for the purchase-money, is a purchaser for value and protected by section 1442 of *The Code* against creditors of an insolvent estate. *Ibid.*
3. One who, with actual notice of the insolvency of an estate, purchases land from one who, without such notice, bought from a devisee after two years from the grant of letters, will be protected by his vendor's want of notice. *Ibid.*

INSOLVENT TRUSTEE:

Where the insolvency of a trustee in a deed of assignment was questioned and it was positively alleged by the plaintiff, and the defendants simply allege their belief that he was not insolvent;

and, upon being required to give bond, the trustee refused so to do: *Held*, that it was proper to appoint a receiver to take charge of the assigned estate pending the litigation. *Bank* v. *Bridgers*, 381.

INSTRUCTIONS TO JURY:

1. In the trial of an action the trial Judge may hand his instructions, in writing, to the jury, and it is not error, after they have retired and requested him to do so, to send a written memorandum of certain dates necessary to be remembered in order to enable them to reach a conclusion. *State* v. *Cagle*, 835.
2. Where an indictment charged that defendant "did convert to his own use and embezzle" a check, an instruction that defendant was guilty if he received the check and misappropriated it fraudulently, whether for his own benefit or not, was proper. *State* v *Foust*, 842.

INSUFFICIENCY OF DESCRIPTION:

A deed which on its face neither absolutely locates nor points to any extrinsic evidence from which the beginning or any one of five succeeding corners can be ascertained, is void for insufficiency of description. *Deaver* v. *Jones*, 649.

INTENT:

1. While secrecy is usually a part of the evidence of felonious intent it is not such an essential accompaniment of larceny as to require the State, in every instance, to prove an attempt to conceal the taking. *State* v. *Hill*, 780.
2. Where, in the trial of an indictment for larceny, there was conflicting evidence as to the manner in which the defendant took and carried from a store a piece of meat, it was proper in the Court to leave the question of felonious intent to the jury. *Ibid.*
3. In the trial of an indictment for obtaining money under false pretenses, it is competent, in order to show the *scienter* and intent, to show other similar transactions by the defendant. *State* v. *Walton*, 783.
4. In a trial for obtaining money under false pretenses by inducing the County Treasurer to cash an order represented by the defendant as being genuine, evidence offered by the defendant as to the stub-book kept by him in the Register of Deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true. *Ibid.*

5. The offence of carrying a concealed weapon consists in the guilty intent to carry the weapon concealed, and does not depend upon the intent to use it; therefore, where, in the trial of one charged with carrying concealed weapons, he testified that he carried it for the purpose of selling it, the trial Judge properly instructed the jury, in effect, that there was no evidence to go to the jury to rebut the presumption of guilt which the statute raised from the possession, about his person and off his own premises, of a concealed deadly weapon. (*State* v. *Harrison*, 93 N. C., 605, overruled). *State* v. *Dixon*, 850.

INTOXICATION:

Intoxication will never excuse one for a failure to exercise the measure of ordinary care and prudence which is due from a sober man under the same circumstances; a person cannot thus voluntarily incapacitate himself from ability to exercise ordinary care and then set up such incapacity as an excuse for his negligence. *Smith* v. *Railroad*, 728.

ISSUES:

1. In the trial of an action it is the duty of the Judge to submit such issues arising on the pleadings as will present the whole matter in controversy and allow the introduction of all material evidence and on the responses to which the Court will be able to pronounce judgment on the merits. *Allen* v. *Allen*, 121.

2. Where plaintiff, being granted leave to amend his complaint and to reply to the answer and to answer the counter-claim which the latter set up, embodied an amendment to the complaint, a reply and an answer to the counter-claim in a pleading, and the defendant filed no other answer, but an issue was raised by the pleadings, it was error to refuse to submit the issue for the consideration of the jury. *Wiggins* v. *Kirkpatrick*, 298.

3. In an action on a note the answer averred that if the note was received at all by plaintiff it was "received coupled with and subject to all the equities" between defendant and the payee, and pleaded a counter-claim on account of defective title to the land for which the note was given; and the amended complaint denied the averment as to the defective title of the land: *Held*, that issues were raised by the pleadings which ought to have been submitted to the jury. *Ibid.*

JUDGE, Discretion of:

1. On appeal from the judgment of the Clerk upon the report of commissioners appointed to lay off ditch for drainage of lowlands the Judge could set aside the report either for cause or in his discretion, if, in his opinion, the ends of justice could be subserved by that course. *Worthington* v. *Coward*, 289.

2. In the trial of an action to set aside as fraudulent a deed of trust from one brother to another it is in the sound discretion of the trial Judge to permit counsel to comment on the failure of the defendant to introduce as witnesses other parties to the transaction. *Bank* v. *Bridgers*, 383.

3. The discretionary power of the trial Judge in respect to challenges of jurors is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by section 1200 of *The Code* than he has to allow more than four of such challenges. (CLARK, J., dissenting). *State* v. *Fuller*, 885.

4. Where the trial Judge found the facts in regard to the alleged misconduct of the jury his refusal of a new trial on that ground is not reviewable in this Court. *Ibid.*

5. Where a trial Judge rests his refusal to exercise his discretion upon the mistaken opinion either that it is not vested in him or that the facts are not such as to call for its exercise, it is error; therefore, where, in a trial for murder, a juror upon his *voir dire* swore that he had neither formed nor expressed an opinion as to the guilt of the prisoner and was accepted and, after verdict and upon motion for a new trial, it appeared from affidavits that such juror had declared that, if summoned on the jury, he would hang the prisoner, and the trial Judge refused the motion because "the affidavits were not sufficiently strong": *Held*, that this was a refusal to exercise the Court's discretion on the ground of a lack of power and was, therefore, erroneous. (CLARK, J., dissenting). *Ibid.*

JUDGE, Failure of to settle case on appeal, 115.

JUDGE, Out of office:

The mere fact that a Judge who tried a cause has gone out of office will not prevent his settling the case on appeal. *Ritter* v. *Grimm*, 373.

JUDICIAL TERM OF OFFICE, 923.

JUDGMENT:

1. A partial payment made on a judgment does not arrest the running of the statute of limitations. *Hughes* v. *Boone*, 54.

2. Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto. *Allison* v. *Maddrey*, 421.

3. A judgment of a Justice of the Peace not docketed within a year from the date of its rendition is dormant and its lost vitality can-

not be restored by docketing the same in the Superior Court, but only by a new action upon it. *Cowen* v. *Withrow*, 558.

4. A purchaser under an execution on a judgment of a Justice of the Peace docketed after the lapse of a year acquires no title although he be a stranger to the judgment and without notice. *Ibid.*

5. Where the summons in an action was served upon W. A. F., who was named in the summons, the fact that a judgment was rendered against "W. H. F." does not necessarily vitiate it or render it void; but it may be corrected by motion in the cause, and is expressly allowed at any time by section 273 of *The Code*, and need not be made within a year after notice thereof. *Rosenthal* v. *Roberson*, 594.

6. A consent judgment cannot be vacated or modified without the acquiescence of all parties, unless its rendition was procured through mistake or by fraud. *Deaver* v. *Jones*, 649.

JUDGMENT, Irregular and void:

1. Where, after a decree ordering a sale of land, in a suit to foreclose a mortgage, the defendant mortgagor died and his heirs were not made parties and the sale was made and confirmed without notice to the heirs, the decree confirming the sale was irregular but not void. *Everett* v. *Reynolds*, 366.

2. The proper remedy to have an irregular judgment, though final, set aside is by a motion in the cause. *Ibid.*

3. A motion to set aside an irregular judgment confirming the sale of land in foreclosure proceedings will not be allowed where there is nothing to indicate that the parties have been or may be prejudiced thereby. *Ibid.*

JUDGMENT FOR VALUE OF LAND IN EJECTMENT:

Effect of satisfaction, 187.

JUDGMENT, Rendered after expiration of term:

A trial Judge has authority, under the agreement of counsel, to determine a case after the adjournment of Court, although his riding of the district be finished before his decision is rendered. *Benbow* v. *Moore*, 263.

JUDGMENT DEBT:

The purchase by a judgment creditor, at his execution sale, of property levied upon as belonging to the judgment debtor for a sum sufficient to pay the debt, interest and costs was a discharge and extinguishment of that particular debt notwithstanding the property so sold was afterwards, in a suit by the owner against the creditor for damages, adjudged to be the property of the former. *Johnson* v. *Gooch*, 62.

JUDGMENT DEBTOR:

A judgment debtor, being the owner at the time of the docketing of a judgment against him of White Acre, sold and conveyed it to another and received, in part payment, a conveyance of Black Acre; upon the issuance of execution he selected Black Acre, which was worth less than $1,000, and insisted upon his right to have the deficiency made up out of White Acre: *Held*, that he had the right to select his homestead in any land which he owned at the date of docketing the judgment and the deficiency, after the allotment of Black Acre, should be made up to him out of White Acre. *Gardner* v. *Batts*, 496.

JUDGMENT LIEN:

1. Where a homestead was allotted to a judgment debtor on judgments docketed in 1873–1875, the lien of the judgments was not barred by the lapse of time in 1891. *Leach* v. *Johnson*, 87.
2. The statute (section 440 of *The Code*) contains no provision extending beyond ten years the lien of a judgment until a motion to revive it and to issue execution thereon can be heard; therefore,
3. Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who *bona fide* bought the land during the ten years. *Pipkin* v. *Adams*, 201.
4. On March 18, 1876, a judgment was docketed against G. and a homestead allotted on July 31, 1876; she conveyed it to H. December 29, 1881, and died June 2, 1891: *Held*, in a proceeding by G.'s administrator to sell the land for assets to pay the judgment, that the lien of the judgment continued so as to be a charge upon the land and that the administrator was entitled to sell it to pay the judgment and costs of its enforcement. *Blythe* v. *Gash*, 659.

JURE MARITI:

1. Where a testator provided in his will for the sale of his lands to a certain person at a price to be ascertained by a prescribed method and for the division of the proceeds among his nieces, there was an equitable conversion of the land at the testator's death, in 1860, and the share of a niece then married became a chose in action and vested in the husband at the time, *jure mariti*,

although the proceeds were not actually received by him until after the adoption of the Constitution of 1868. *Benbow* v. *Moore*, 263.

2 Where, in such case, the husband invested the proceeds of the chose in action, so reduced into his possession, in land without any special agreement to invest and hold for the benefit of the wife, there was no resulting trust in her favor. *Ibid.*

3. The legacy, notwithstanding an adverse claim was unsuccessfully made by another to the land so ordered to be sold, was the qualified property of the husband, and upon its reduction into possession the title to it related back to the date of the testator's death and not to the time of its actual reduction. *Ibid.*

JURISDICTION:

1. A Clerk having jurisdiction of a petition for partition, the transfer thereof to term for trial of issues raised by the pleadings transferred the jurisdiction to the Judge, and his denial of a motion for leave to amend the petition upon the ground that he had no power to grant it was error. *Godwin* v. *Early*, 11.

2. Where the object of an action is to set up a parol trust in favor of the plaintiff and to declare him the equitable owner of the interest of the trustors in a deed of trust and to have an account stated of the indebtedness secured by the deed of trust to the end that he may pay the same and obtain a fee-simple title to the property and to enjoin a sale under the deed, the plaintiff and trustors being citizens of North Carolina and the trustee and creditors being citizens of Virginia, the case is one where the matters in controversy are not separable, inasmuch as the issues as to the parol trust must be tried in the Courts of this State and the necessity for an account cannot be determined until the trial of those issues. *Faison* v. *Hardy*, 429.

3. The finding of the Court below that an appearance entered by a defendant in an action was a special appearance is not reviewable in this Court. *Long* v. *Insurance Co.*, 465.

4. The service of summons and other process which ch. 120, Acts of 1891, authorizes to be made upon a non-resident by an officer of the county and State where he resides, is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to-wit, in actions which are virtually proceedings *in rem* or *quasi in rem*, and in which the jurisdiction as to non-residents only authorizes a judgment acting upon the property. *Ibid.*

5. Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be

no service by publication of the summons and, hence, actual service in another State "in lieu of publication" would be invalid. *Ibid.*

6. One who has an account against another consisting of several distinct items based on separate transactions may bring an action upon each distinct and separate item, provided that if he should bring more actions than are necessary to avail himself of the jurisdiction of a Justice of the Peace the Court may, to prevent oppression and unnecessary costs, require a consolidation of the actions; but if, before action brought, the plaintiff renders a statement covering all the items contracted at different dates, to which no objection is made by the debtor within a reasonable time, the account becomes an account stated and cannot be then split up. *Simpson* v. *Elwood*, 528.

7. The Superior Court has general jurisdiction of all assaults and batteries. *State* v. *Ridley*, 827.

8. Where an indictment, found in October, 1893, charged that on the 1st of July, 1893, defendant made an assault with a deadly weapon, to-wit, a certain rock, knife and brickbat, want of jurisdiction did not appear, for, time not being of the essence of the offence, the charge would have been sustained and the jurisdiction maintained by proof of a simple assault more than one and less than two years from the finding of the indictment. *Ibid.*

9. Where the jurisdiction of the Court is voidable by matter *de hors* the record, but no defect of authority appears upon an inspection of the record of an indictment, trial and conviction, such a record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted though it was not defeated. *Ibid.*

10. One State or sovereignty cannot enforce the penal or criminal laws of another or punish crimes or offences committed in and against another State or sovereignty. *State* v. *Hall*, 909.

11. Where the fatal stroke and death occur in the same State the offence of murder at common law is there complete, and the Courts of that State can alone try the offender for that specific common law crime. *Ibid.*

12. Where one puts in force an agency for the commission of crime he, in legal contemplation, accompanies the same to the point where it becomes effectual—the criminal act is the impinging of the weapon on the party injured, and that is where the impingement happens; therefore, where one, standing in North Carolina, by the firing of a bullet, killed another standing in Tennessee, the assault or stroke was in the latter State and at common law the

murder was committed in that State, and its Courts alone have jurisdiction of the offence. *Ibid.*

13. Nor, in such case, is jurisdiction conferred upon the Courts in this State by the statute (section 1197 of *The Code*) which provides that "in all cases of felonious homicide, where the assault shall have been made within this State, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the manner, to all intents and purposes as if the person assaulted had died within the limits of this State"; the term "assault," as used in such statute meaning, not a mere *attempt*, but an injury inflicted in this State, and resulting in death in another State. *Ibid.*

14. Nor, in such case, will the fact that both the defendant and deceased were citizens of North Carolina confer jurisdiction on the Courts of this State, for the personal jurisdiction generally claimed by nations over their subjects who have committed offences abroad or on the high seas does not exist as between the States of the Union under their peculiar relation to each other. *Ibid.*

JURISDICTION IN PROCEEDINGS TO ESTABLISH PUBLIC ROADS, 683.

JURORS:

1. Under section 1200 of *The Code* it is error on the trial of capital cases to permit the State to peremptorily challenge a juror after he has been passed by the State and tendered to the prisoner. (Clark, J., dissenting). *State* v. *Fuller*, 885.

2. The discretionary power of the trial Judge in respect to challenges of jurors is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by section 1200 of *The Code* than he has to allow more than four of such challenges. (Clark, J., dissenting). *Ibid.*

3. Where the trial Judge found the facts in regard to the alleged misconduct of the jury his refusal of a new trial on that ground is not reviewable in this Court. *Ibid.*

JUSTICE OF THE PEACE:

1. The privy examination of a wife, as to the execution by her of a deed, taken in one county by a Justice of the Peace resident in another county, is invalid. *Dixon* v. *Robbins*, 102.

2. A judgment of a Justice of the Peace not docketed within a year from the date of its rendition is dormant and its lost vitality

cannot be restored by docketing the same in the Superior Court, but only by a new action upon it. *Cowen* v. *Withrow*, 558.

3. A purchaser under an execution on a judgment of a Justice of the Peace docketed after the lapse of a year acquires no title although he be a stranger to the judgment and without notice. *Ibid.*

LABORERS, Earnings of:

The exemption of earnings for sixty days allowed to a judgment debtor under section 493 of *The Code* applies only as to proceedings on judgments for private debts and not to taxes. *Wilmington* v. *Sprunt*, 310.

LAND:

Notes of a married woman given for purchase of land will be declared a charge thereon when she sets up her coverture as a defence. *Draper* v. *Allen*, 50.

LANDLORD'S LIEN FOR RENT AND ADVANCES:

Although, under sections 1754, 1799 and 1800 of *The Code*, the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown and not for a balance due for an antecedent year. *Ballard* v. *Johnson*, 141.

LANDLORD AND TENANT:

1. A release of a landlord's lien on a crop can only arise upon an absolute and unqualified division to the tenant of his share; therefore,

2. Where a landlord and his tenant through a common agent designated and set apart the share of the crop which the tenant was to have whenever the advancements were paid on it, and the tenant was told not to remove such share until the lien was paid off, there was no such division as to divest the lien of the landlord. *Jarrell* v. *Daniel*, 212.

LAPPAGE, 357:

1. Where the boundaries of two grants or deeds lap upon each other, the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage. *Boomer* v. *Gibbs*, 76.

2. Possession of part of the lappage by the one having the inferior title gives constructive possession of the whole lappage so long as the one having the better title has not actual possession of any part. *Ibid.*

3. Under *The Code*, §141, providing that no action shall be had against one who has been in possession of land, under color of title, for seven years, by one having right or title thereto, except during the seven years next after his right or title shall have descended or accrued, the statute begins to run against one to whom a grant of the land has been made only from the time of the grant. *Hamilton* v. *Icard*, 532.

LARCENY:

1. While secrecy is usually a part of the evidence of felonious intent it is not such an essential accompaniment of larceny as to require the State, in every instance, to prove an attempt to conceal the taking. *State* v. *Hill*, 780.
2. Where, in the trial for larceny, there was conflicting evidence as to the manner in which the defendant took and carried from a store a piece of meat, it was proper in the Court to leave the question of felonious intent to the jury. *Ibid.*

LEASE:

1. Where a lease was, by its terms, terminable upon the sale of the land by the lessor, and the latter conveyed the land to his wife for life with remainder over and he and his wife thereafter executed a mortgage upon the wife's life estate, which was sold under the power of sale contained in the mortgage: *Held* (1), that such conveyances constituted a "sale" of the land and terminated the lease; (2), that the purchaser of the said life estate was the proper person to give to the occupants of the lot notice that the lease was ended and that they should take notice of that fact and conform to the terms of the lease, and the failure of the remaindermen to join such purchaser in giving the notice cannot affect the latter's rights; (3), a notice by such purchaser to the occupants of the lot that he had purchased the lot and that the lease was ended was sufficient, although it did not specifically require the removal of the building. *Aydlett* v. *Pendleton*, 1.
2. Where a lease by A. and wife of the land of A. provided that it should terminate upon the sale of the land by the lessors and A. conveyed his interest in the land to his wife for life with remainder over, and in a suit by the wife against the lessee for possession upon the ground that the conveyance by the husband terminated the lease it was adjudged that the lease had not been determined, such adjudication could not affect the rights of a subsequent purchaser of the wife's life estate in a suit for possession upon the ground that the sale by both the husband and wife of their interest in the land had terminated the lease. *Ibid.*

LETTERS OF ADMINISTRATION, Application for, 248.

LEGACIES:

1. Where twenty years have elapsed between the time when suit might have been instituted for the recovery of legacies and the actual date of suit the law will, for the sake of repose and to discourage stale claims, raise a presumption that the legacies have been paid or satisfied, or that the claim therefor has been abandoned. *Cox* v. *Brower*, 422.
2. Such presumption would not be rebutted although it should be shown that the interval between the death of the legatee and the appointment of an administrator had been sufficient to reduce the period during which there was a person to bring action to less than twenty years. *Ibid.*
3. The fact that a legatee was at the time of the death of the testator a non-resident of the State will not excuse his laches and delay in bringing suit, since he had the right to sue and the Courts were at all times open to non-residents as well as residents of the State. *Ibid.*

LIEN, Vendor's:

A vendor's lien for the purchase-money of land does not exist in this State. *Draper* v. *Allen*, 50, and *Quinnerly* v. *Quinnerly*, 145.

LIEN FOR ADVANCES:

1. Although under sections 1754, 1799 and 1800 of *The Code* the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard* v. *Johnson*, 141.
2. A release of a landlord's lien on a crop can only arise upon an absolute and unqualified division to the tenant of his share; therefore, where a landlord and his tenant through a common agent designated and set apart the share of the crop which the tenant was to have whenever the advancements were paid on it, and the tenant was told not to remove such share until the lien was paid off, there was no such division as to divest the lien of the landlord. *Jarrell* v. *Daniel*, 212.
3. Lien for advances to aid in the cultivation of crops has priority over mortgage indebtedness when the mortgagor is allowed to remain in possession. *Carr* v. *Dail*, 284.

MAILING PROCESS: See "PROCESS."

LIEN FOR TAXES ON MORTGAGED LAND:

1. It is incumbent on a mortgagee to see to it that the land mortgaged is listed for taxes and that the taxes be paid. *Wooten* v. *Sugg*, 295.

2. Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. *Ibid.*

LIEN OF JUDGMENT, 377 (see, also, "JUDGMENT"):

On March 18, 1876, a judgment was docketed against G. and a homestead allotted on July 31, 1876; she conveyed it to H. December 29, 1881, and died June 2, 1891: *Held*, in a proceeding by G.'s administrator to sell the land for assets to pay the judgment, that the lien continued so as to be a charge upon the land, and that the administrator was entitled to sell it to pay the judgment and costs of its enforcement. *Blythe* v. *Gash*, 659.

LIMITATIONS: See "STATUTE OF LIMITATIONS."

LIMITATION, Conditional: See "DEVISE."

LIS PENDENS (see, also, 1 and 6 of "ACTION TO SUBJECT LAND TO PAYMENT OF DECEDENT'S DEBTS"):

1. Under section 229 of *The Code*, which is a statutory substitute for the common law rule of *lis pendens*, it is unnecessary to file a separate and formal notice when the action affecting the title to land is pending in the county where the land is situated, provided the pleadings contain the names of the parties, the object of the action and a description of the land to be affected. *Arrington* v. *Arrington*, 151.

2. Where the designation of land in the pleadings is so definite that any one by reading it can learn thereby, either by description or reference, what property is intended to be made the subject of litigation, it is sufficient to constitute *lis pendens*. *Ibid.*

3. Although, where a suit affecting the title to real estate is prosecuted with diligence, the *lis pendens* continues until final judgment, or until canceled under direction of the Court, and no loss or destruction of the notice will affect its efficiency, yet, where the suit is transferred, by consent, to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the *lis pendens* fails and a *bona fide* purchaser will be protected. *Ibid.*

MALICE:

Malice, but not premeditation or deliberation, is presumed from the use of a deadly weapon. *State* v. *Fuller*, 885.

MARKET VALUE, 224.

MARRIAGE EVIDENCE:

1. A paper-writing purporting to be a contract of marriage, and to be signed by the contracting parties at the time of the alleged marriage, is admissible, in the trial of an indictment for fornication and adultery, not only in corroboration of a witness who testified to the facts, but also as substantive evidence to prove the marriage. *State* v. *Behrman*, 797.

2. Where, in the trial of an indictment for fornication and adultery, a photograph of defendant was introduced, on the back of which, signed with his name, were words purporting to be a marriage to his wife and indicating that the one to whom the message was addressed was married, and the alleged wife (prosecuting witness) testified that the writing was the defendant's and that the photograph had been sent to her: *Held*, that such writing was admissible as an acknowledgment of marriage. *Ibid.*

3. Where, in the trial of an indictment for fornication and adultery, the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi attesting the marriage and certified by the signature and seal of the official minister of such foreign country was competent as a part of the *res gestæ* to support the testimony of the prosecuting witness as to the fact of the marriage. *Ibid.*

MARRIAGE LICENSE:

1. What is negligence and what is reasonable diligence are, when the facts are ascertained, questions of law to be declared by the Court; therefore, in an action against a Register of Deeds for wrongfully issuing a marriage license, it was error to leave to the jury the question whether the defendant made reasonable inquiry as to the age of the female. *Joyner* v. *Roberts*, 389.

2. A Register of Deeds who issues license for the marriage of a female under eighteen years of age, after being informed and believing that her father is dead and after obtaining the written consent of her mother, will be considered as having made such reasonable inquiry as contemplated by the statute. *Ibid.*

MARRIED WOMAN (see, also, "FEME COVERT"), 196:

1. Since a *feme covert* may, with the consent of her husband, convey her land "as if she were single," a conveyance by her estops her from afterward acquiring by grant from the State riparian rights incident to the land conveyed, and even if she subsequently entered under another title lapping upon the boundaries of her own conveyance it was necessary in order to effect a disseizin that she should occupy the interference and to mature title that the occupation should continue seven years. *Zimmerman* v. *Robinson*, 39.
2. Any deed made to her subsequently would feed the estoppel, and she could only have availed herself of it by actual occupation of the land previously conveyed. *Ibid.*
3. Although a *feme covert* cannot charge her separate real estate by an obligation in the nature of a contract unless she be privily examined as to her consent, and although her contracts will, upon the plea of her coverture, be declared void, yet equity will not permit her to repudiate a transaction and at the same time retain and enjoy its benefits. *Draper* v. *Allen*, 50.
4. A note signed by husband and wife containing a clause, "and the said husband hereby consents that the above note shall be a charge on the separate estate of his said wife for the payment of this note," expressly charges the separate personal estate of the wife. *Jones* v. *Craigmiles*, 613.
5. In the case of an express charge it is not necessary that it should appear that the consideration is beneficial to the wife nor that the separate estate should be specifically described. *Ibid.*
6. To make a contract of husband and wife an express charge upon her separate personal estate it is unnecessary that the assent of the husband shall be signified by a separate clause, his execution of the paper jointly with his wife being a sufficient compliance with the law in this respect. *Ibid.*
7. It is necessary in an action to enforce an executory contract of a married woman, as a charge upon her separate estate, that the complaint should describe the property to be charged. *Ibid.*
8. In an action to have the contract of a married woman declared a charge upon her separate estate equity will, in proper cases, lend its aid by the appointment of a receiver or by other interlocutory orders necessary to protect the rights of the creditors. *Ibid.*

MEASURE OF DAMAGES, 482, 597.

MEMORANDA:

1. A witness may be compelled, at the instance of a party who is examining him, to inspect a writing which is present in court and in his own handwriting, or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates. *State* v. *Staton*, 813.

2. Where a writing relates to collateral matters and a defendant on trial could derive no benefit from compelling a witness for the prosecution to inspect it, the refusal of the Court to compel witness to refresh his indistinct recollection of the matter is a harmless error and not reversible. *Ibid.*

MONUMENTS: See "SURVEY."

MINORS:

1. The Legislature may declare it unlawful for any minor to enter a bar-room. *State* v. *Austin*, 855.

2. An ordinance of a town prohibiting an unmarried minor, except when acting as agent for his father or guardian, from entering any bar-room or room where spirituous, vinous or malt liquors are kept for sale, is valid, being reasonable and consistent with the laws of the State. *Ibid.*

MISAPPROPRIATION OF FUNDS:

Where an indictment charged that defendant "did convert to his own use and embezzle" a check, an instruction that defendant was guilty if he received the check and misappropriated it fraudulently, whether for his own benefit or not, was proper. *State* v. *Foust*, 842.

MISDEMEANOR:

Begetting a bastard child is, under section 35 of *The Code*, a misdemeanor. *Myers* v. *Stafford*, 234.

MONUMENTS: See "SURVEY."

MORTGAGE, Of homestead, 377.

1. A mortgage of lands by one indebted at the time bars any homestead right therein without the joinder and privy examination of the wife, if the homestead had not been allotted and there were no docketed judgments upon which the homestead could be allotted. *Dixon* v. *Robbins*, 102.

2. No notice to a purchaser of land, however full and formal, will supply the place of registration; and, hence, a mortgage for the purchase-money of land has no priority over a second mortgage filed first, although the second mortgage has notice thereof. *Quinnerly* v. *Quinnerly*, 145.

3. The Act of 1891, ch. 391, authorizing the sale of land for taxes in arrears for the years 1881 to 1886, inclusive, provided that such sale should not affect purchasers of land who had no notice of such unpaid taxes; M., the assignee of a mortgage on land, had, at the time of the transfer to him, no notice that there were any unpaid taxes due on the mortgaged land, but at the time and prior to the sale of the land under foreclosure proceedings at which he bought he had such notice: *Held*, that, as the title acquired at a forclosure sale relates back to the date of the execution of the mortgage, the land was not liable for taxes assessed against it before the date of the mortgage. *Moore* v. *Sugg*, 292.

MORTGAGE OF WIFE'S LAND AS SURETY FOR HUSBAND'S DEBT:

A married woman, who has mortgaged her land as security for her husband's debt, has the rights of a surety as to the liability thus imposed on her property, and is entitled to have all of her husband's estate included in the mortgage exhausted to the exoneration of hers, and may also object to the diversion of funds that should have been applied on the debt to her exoneration. *Deans* v. *Pate*, 194.

MORTGAGEE:

1. It is incumbent on a mortgagee to see to it that the land mortgaged is listed for taxes and that the taxes be paid. *Wooten* v. *Sugg*, 295.

2. Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. *Ibid.*

3. After default, a mortgagee may maintain an action to recover possession of the mortgaged premises. *Kiser* v. *Combs*, 640.

MORTGAGOR IN POSSESSION:

An agricultural lien given by a mortgagor in possession of land to aid in the cultivation of a crop thereon will not be subordinated to the mortgage indebtedness. *Carr* v. *Dail*, 284.

MOTION TO SET ASIDE VERDICT:

1. By agreement of counsel a motion to set aside a verdict on the ground of excessive damages assessed thereby made at the trial term may be heard and determined by the same Judge at a subsequent term. *Myers* v. *Stafford*, 231.

2. The fact that an appeal was perfected pending a motion to set aside a verdict, the hearing of which had been postponed by consent to a subsequent term of Court, did not debar the Judge below from hearing and determining such motion at the time appointed. *Ibid.*

MUNICIPAL AUTHORITY:

1. A city has exactly the same rights in and is under the same responsibilities for a street which it controls by dedication only as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned. *Tate* v. *Greensboro*, 392.

2. The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. *Ibid.*

3. The charter of the city of Greensboro and the general law of the State (*The Code*, ch. 62, Vol. II) give to the municipal authorities of that city wide discretion in the control and improvement of its streets, and if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*. *Ibid.*

4. The Courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion. *Ibid.*

5. The power given to a city over the streets can be delegated to a street committee composed of members of the Board of Aldermen, and the members of such committee, acting as such and within the limits of the power of the city, are not answerable, individually, for damage resulting from their acts. *Ibid.*

6. The Legislature may transfer to municipal bodies created by it the duty and responsibility of exercising a portion of its own police power in such manner as the commissioners may deem necessary. *State* v. *Austin*, 855.

7. Where the charter of a town authorizes the commissioners "to make such by-laws, rules and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land," an ordinance prohibiting an unmarried minor, except when acting as the agent of his parent or guardian, from entering any bar-room or room where spirituous, vinous or malt liquors are kept for sale, is valid, being reasonable and consistent with the laws of the State. *Ibid.*

MUNICIPAL BONDS:

1. Where there is an inherent constitutional defect in the statute authorizing the issue of municipal bonds, or in the proceedings under which they are issued, a purchaser takes with notice and there can be no such thing as an innocent holder. *Claybrook* v. *Commissioners*, 453.
2. The only authority that can fasten upon a municipality an obligation to pay a subscription to a railroad is the duly ascertained vote of a majority of its qualified voters, and bonds issued without such vote being ascertained and declared are invalid even in the hands of an innocent purchaser. *Ibid.*
3. Where bonds were issued by the commissioners of a county on behalf of a town under an act of the Legislature authorizing the issue upon an affirmative vote of a majority of the qualified voters of the town and neither the declaration of the result of the election nor the recitals in the bonds show that a majority voted in favor of the subscription, the purchasers of the bonds, though *bona fide* and for value, will not be protected in a suit to restrain the collection of taxes to pay the same unless that fact be found in the affirmative by a jury. *Ibid.*

MUNICIPAL CORPORATION:

1. Under section 3803 of *The Code*, applicable to all towns and cities, in the absence of other modes provided specially by charter, giving authority to keep in proper repair the streets, etc., of the towns, and by the charter of Asheville (chapter 111, Private Acts 1883), which gives authority to provide for repairing the streets, removing nuisances, and to condemn land for opening, widening and straightening streets, the city of Asheville has authority to change the grade of a street. *Wolfe* v. *Pearson*, 621.
2. A city is liable for damages caused by grading streets only when the work is done in an unskillful manner. *Ibid.*
3. Ratification is equivalent to a previous authority; therefore the ratification by a city of an act done by an unauthorized person to the injury of another, but which, if done by the city, would have been rightful, relieves such person from liability as a trespasser although the ratification was after suit brought by the injured party. *Ibid.*
4. Where a nuisance is both public and private in its effect it may be abated by one to whom it is specially injurious. *Ibid.*
5. Where defendant, assuming to act for a city, changed the grade of a street and removed therefrom plaintiff's wall, which encroached thereon so as to constitute a nuisance, and the city ratified his acts after suit brought, plaintiff could only recover

damages resulting during the time between the act and the ratification. *Ibid.*

6. Municipal corporations may, if there is no law to the contrary, prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe; and, it seems, this may be done by or through the delegated authority of the Legislature, even where the enforcement of the law or ordinance causes a suspension of work previously contracted for. *State* v. *Johnson*, 846.
7. Where the Legislature has granted authority to a municipality to supervise or prevent the replacing of a roof with another of shingles, instead of constructing one of material less liable to destruction, an ordinance forbidding an owner of a building within a prescribed fire limit to alter or repair a wooden building within such limit, without the consent of the Board of Aldermen, is not unreasonable, and will be upheld. *Ibid.*

MUNICIPALITY, Boundaries of:

A grant to a riparian owner, running with a navigable stream, extends only to the low water mark and not to the thread of the stream, and in defining the limits of an incorporated town bordering on such a stream the same rule of construction applies. *State* v. *Eason*, 787.

MURDER:

1. Where, in the trial of two persons for murder, it appeared that in a mutual affray and an unequal contest between the deceased, who was unarmed, and the two defendants, one of the latter threw deceased to the ground and held him there while the other procured an axe and crushed his skull, it was not error to instruct the jury that the defendants were guilty of murder, the circumstances of the holding by one and the hitting by the other defendant being inconsistent with the legal conception of a killing in the heat of passion engendered in an encounter. *State* v. *Coley*, 879.
2. Where a trial Judge, in defining two degrees of murder, inadvertently instructed the jury that the fact of killing with a deadly weapon, when admitted, raised the presumption or justified the inference that there was premeditation instead of malice, it was an erroneous instruction that could not be cured by any subsequent proposition that did not clearly remove from the minds of the jury the impression created by such instruction. (CLARK, J., dissenting). *State* v. *Fuller*, 885.

MURDER, Degrees in, 879.

NAKED TRUST, 425.

NEGLIGENCE:

1. Negligence being a failure of duty, proof that a "live wire" carrying a deadly current of electricity was hanging over and lying upon a sidewalk, and that it had been placed above the street by and was the property of the defendant corporation and was under the control of the servants of the latter, and that by contact with such wire a person, having a right to be on the street, was killed, constituted a complete *prima facie* case of negligence, and the burden was put upon the defendant to show that the wire was not down through any negligence of itself or its servants or agents. *Haynes* v. *Gas Company*, 203.
2. Where, in the trial of an action for an injury resulting in death and caused by the alleged negligence of the defendant, it appeared that the deceased, an intelligent boy ten years old, while walking on the sidewalk of the street, grasped a "live" guy wire hanging to the street and belonging to the defendant, and was killed by the contact, and there was no visible indication that the wire was charged with electricity: *Held*, that the trial Judge should have told the jury that there was no evidence of contributory negligence on the part of the deceased. *Ibid.*
3. The utmost degree of care in the construction, inspection and repair of wires and poles is required of those who are allowed to place above the streets of a city wires charged or likely to be charged with a deadly current of electricity, so that travelers along the highways may not be injured by defective appliances. *Ibid.*
4. What is negligence and what is reasonable diligence are, when the facts are ascertained, questions of law to be declared by the Court. *Joyner* v. *Roberts*, 389.
5. Where, in an action against a railroad company for negligently causing the death of plaintiff's intestate, the complaint alleges no other negligence than the failure of the engineer to give any notice, by whistle, bell or otherwise, of the approach of the train to intestate, who was walking on the track and was run over and killed by the locomotive, no sufficient cause of action is stated. *Fulp* v. *Railway Co.*, 697.
6. An infant twenty-two months old is incapable of contributory negligence so as to relieve a railroad from liability for the negligent acts of its employees. *Bottoms* v. *Railroad*, 699.
7. The negligence of a parent or guardian in allowing a child of tender years to stray and wander on a railroad track cannot be imputed to such child so as to relieve a railroad company from

responsibility for the negligence of its employees in an action brought by or on behalf of the child. *Ibid.*

8. While an engineer of a moving train has the right to suppose that an adult on the track will leave it and is not required to slacken speed, yet when a child without discretion or intelligence is seen or can be seen its presence must be regarded; and if the engineer, by the exercise of reasonable care and prudence, can discover a child on the track in time to stop the train, or can, with the exercise of reasonable or ordinary care and prudence, discover that a small child is going towards the track or running near so as to make it probable that it will go on the track, and such discovery can be made in time to stop the train, it is the duty of the engineer to stop and negligence in the company if he does not stop. *Ibid.*

9. Where a plaintiff brakeman disregarded the rules of a railroad company forbidding brakemen to go between the cars in coupling them, which he had agreed to observe, and was injured, the fact that the conductor of the train, who had previously seen him go between the cars in coupling them, told him to "hurry up and couple the cars" did not amount to an order to go between the cars so as to relieve the plaintiff from the imputation of contributory negligence in so doing. *Mason* v. *Railroad*, 718.

10. While a brakeman is not culpable for exposing himself to danger in disregard of the rules of the company, but in obedience to the orders of the conductor in charge of a train, yet the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not be otherwise coupled did not justify him in doing so several months later when under the control of another conductor who gave no such order. *Ibid.*

11. Where plaintiff and defendant were both concurrently negligent and the negligence of the former was the proximate cause of injury to the plaintiff the latter cannot recover damages for the same. *Ibid.*

12. It is the duty of a railroad company in running its trains to keep a lookout on its track in order to discover and avoid any obstructions that may be encountered thereon, and if by reasonable watchfulness on the part of the engineer he might discover a person on the track in a perilous position and apparently insensible to danger, in time to avoid injury, and the engineer fails to keep such lookout and by reason thereof injury results, the railroad company is guilty of negligence for which an action may be maintained, provided that the person injured has not been guilty of contributory negligence. *Smith* v. *Railroad*, 728.

NEGOTIABLE INSTRUMENT:

1. A bond negotiable in form and indorsed for value and without notice before maturity is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. *Christian* v. *Parrott*, 215.
2. The obligor in such a bond cannot set up the defence that prior to its transfer the payee agreed to release him from liability thereon. *Ibid.*
3. Plaintiff bank rediscounted for N. Bank, along with other notes, a note of the defendants (against which the latter claimed an equity) and placed the proceeds to the credit of N. Bank, and before receiving notice of the equity paid checks of N. Bank to the extent of half of the proceeds of such rediscount: *Held*, that plaintiff was a purchaser of such note for value, although between the date of such rediscount and notice of the equity plaintiff had credited other items to N. Bank and at time of such notice owed the latter more than the proceeds of the rediscount. *Bank* v. *McNair*, 335.
4. The lapse of three years protects the surety on a sealed instrument. *Coffey* v. *Reinhart*, 509.
5. Although a bond is joint and several on its face the suretyship of an obligor may be shown by parol, but to obtain protection by the lapse of three years the surety must show that his relation was known to the creditor. *Ibid.*
6. If the suretyship of the surety is known to the original payee and the note be assigned after maturity the surety will be protected by the lapse of three years after maturity, although the assignee takes without notice; otherwise if the note be assigned before maturity to one without notice. *Ibid.*
7. If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Ibid.*
8. Where the payee (whether original or by a previous indorsement) of a note assigns or transfers it by indorsement he becomes simply an indorser and, by section 50 of *The Code*, liable as a surety unless by the terms of the assignment he limits his liability; if he intends to transfer the title only he should use the words "without recourse" or other phrase of similar import. *Davidson* v. *Powell*, 575.
9. An indorsement, "I assign over the within note to P.," does not limit the indorser's liability as such. *Ibid.*

10. While, if the note be in the hands of the original payee, an indorsement may be shown to have been upon certain conditions, yet a *bona fide* holder for value, before maturity and without notice, is not affected by any equities existing between the original parties, and the same rule applies between the last payee and all subsequent indorsers. *Ibid.*

11. The burden of proof is upon an indorser to show any agreement by which his liability was restricted. *Ibid.*

NOMINAL DAMAGES, 440.

NON-RESIDENT LEGATEE, 422.

NONSUIT:

Where the defendant in an action to recover land sets up a counterclaim for substantive relief the plaintiff is not entitled to take a nonsuit. *Wilkins* v. *Suttles*, 550.

NOTARY PUBLIC:

1. The certificate of a Notary Public concerning the probate or acknowledgment of deeds is *prima facie* evidence of the truth of its pertinent recitals; hence a notary's certificate on a trust deed signed by "W., K. & Co." that it was "acknowledged by E. W., one of the firm of W., K. & Co., the grantors," is evidence of the fact that the deed was executed by a member of the firm. *Pipe and Foundry Co.* v. *Woltman*, 178.

2. The statute authorizing a Notary Public to take acknowledgments of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary. *Deans* v. *Pate*, 194.

NOTE UNDER SEAL: See "BOND."

NOTICE:

1. No notice to a purchaser of land, however full and formal, will supply the place of registration; therefore, a mortgage given for the purchase-money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. *Quinnerly* v. *Quinnerly*, 145.

2. Under Connor's Act actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered. *Maddox* v. *Arp*, 585.

NOTICE, Constructive: See "LIS PENDENS."

NOTICE OF APPEAL: See "APPEAL" (1).

NOTICE OF SURETYSHIP ON NOTE: See "SURETY."

NOTICE TO QUIT LEASED PREMISES:

The purchaser of the life estate in leased premises is the proper person to give notice to occupants of the termination of the lease, and the remaindermen need not join in giving such notice. *Aydlett* v. *Pendleton*, 1.

NUISANCE:

1. Where a nuisance is both public and private in its effect it may be abated by one to whom it is specially injurious. *Wolfe* v. *Pearson*, 621.
2. Where defendant, assuming to act for a city, changed the grade of a street and removed therefrom plaintiff's wall, which encroached thereon so as to constitute a nuisance, and the city ratified his acts after suit brought, plaintiff could only recover damages resulting during the time between the act and the ratification. *Ibid.*

OFFICER OF CORPORATION:

A corporation is liable on a contract made by its general manager within the scope of its business. *Clowe* v. *Pine Product Co.*, 304.

OFFICER OF CITY, How affected by amendment of city charter, 678.

OFFICE, Term of, 903.

OPINION:

1. To be indictable the false pretense must be of some existing fact in contradistinction alike from a mere promise or a mere opinion. *State* v. *Daniel*, 823.
2. Where defendant obtained a bottle of medicine from another by false representations that it was too strong to be applied on the face of such other, he cannot be held guilty of obtaining goods under false pretenses. *Ibid.*

OPINION OF WITNESS, 879.

OPTION, 108.

ORDER OF ARREST:

Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto. *Allison* v. *Maddrey*, 421.

ORDINANCE, Town:

1. Where the charter of a town authorizes the commissioners "to make such by-laws, rules and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land," an ordinance prohibiting an unmarried minor, except when acting as the agent of his parent or guardian, from entering any bar-room or room where spirituous, vinous or malt liquors are kept for sale, is valid, being reasonable and consistent with the laws of the State. *State* v. *Austin*, 855.

2. Where, by section 36 of ch. 111, Acts of 1883, the Legislature empowered the city of Asheville to levy and collect upon every license to retail spirituous or malt liquors a tax not exceeding $500, and by section 19 of said act authorized the Board of Aldermen of said city "to regulate and restrain tippling-houses": *Held*, that the city had authority to impose such license tax and to pass all needful ordinances to carry into effect the intent and meaning of the act of the Legislature and to impose a fine or penalty for the violation of the same. *State* v. *Stevens*, 873.

3. An ordinance of a city imposing a fine or penalty for selling liquor without license does not conflict with the general laws of the State prohibiting the sale of liquor without license and is therefore valid, and a prosecution under it does not conflict with any criminal action pending or that may be instituted against the defendant on account of the alleged selling as an act violative of the general State law. *Ibid.*

OYSTER BEDS:

1. Where a grant has been issued in strict compliance with the law rights of property have been acquired which cannot be taken away, even by the State, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain. *State* v. *Spencer*, 770.

2. The decision of the Board of Shell-fish Commissioners fixing the location of the public grounds under the provisions of ch. 119, Acts of 1887, is final where there was no protest or appeal and in the absence of fraud or mistake; and an entry and grant of a natural oyster bed not included in the boundaries fixed by the Board cannot be vacated on the ground that such bed was not subject to entry. *Ibid.*

PAROL TRUST:

A party seeking an interlocutory injunction is not required to establish his right with the same precision and certainty that is necessary on the final hearing; therefore, while on the trial of an issue as to the existence of a parol trust the plaintiff must produce strong and convincing proof of an agreement amounting to a trust existing at the time, the rule does not apply to the intensity of proof to be offered in the prosecution of a remedy ancillary to the real object of the action. *Faison* v. *Hardy*, 58.

PAROL EVIDENCE:

Parol evidence is admissible in the trial of an action on a written contract to explain the meaning of abbreviations of words and figures contained therein. *White* v. *McMillan*, 349.

PARTIES:

1. A defect of parties, if it appears on face of complaint, should be taken advantage of by demurrer; if otherwise, the defendant should in his answer set out the names of the necessary parties so that the Court may before trial decide that all are present or not. *Johnson* v. *Gooch*, 62.
2. The simple naming of "the children of Alexander James and the children of Calvin James" as plaintiffs does not have the effect to make them parties as required under the rules of practice in the Superior Courts (17 and 16 Clark's Code, p. 724), which point out the proper mode by which minors may sue or answer. *James* v. *Withers*, 474.

PARTITION:

1. While a petition for partition of land is defective which does not set forth that the petitioners are tenants in common and in possession (the general rule being that possession of one tenant in common is the possession of all), yet the omission of such allegation does not deprive the Clerk of jurisdiction, but constitutes simply a defective statement of a cause of action. *Godwin* v. *Early*, 11.
2. A Clerk having jurisdiction of a petition for partition, the transfer thereof to term for trial of issues raised by the pleadings transferred the jurisdiction to the Judge, and his denial of a motion for leave to amend the petition upon the ground that he had no power to grant it was error. *Ibid.*
3. Where there are contingent interests to be affected by the proceeding for the sale of land for partition it will be decreed if there is some one before the Court to represent such interest, it being a general principle that every one has a right to enjoy his own in severalty. *Overman* v. *Tate*, 571.
4. The interest in land of one co-tenant was conveyed to T. and his heirs in trust for the sole and separate use of T.'s wife for life "and at her death to such child or children and the representa-

tives of such as she shall have living by the said T., and their heirs forever," and in default of such child or representative of such living at the death of the wife, then to T. and his heirs; T. died leaving him surviving his wife and two children by her, as well as children and grandchildren by a former marriage: *Held*, in a suit for a sale for partition to which all of the persons named, together with the trustees, are parties and ask for the sale, the co-tenant is entitled to have the land sold for partition. *Ibid.*

PARTNER:

1. Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, for all the purposes of arrest and bail, from such knowledge and act. *Boykin* v. *Maddrey*, 89.
2. A trust deed executed by one member of the firm in the firm name, with seal attached, is binding on the firm as a contract, though not as a deed. *Pipe and Foundry Co.* v. *Woltman*, 178.

PARTNERSHIP:

1. A partnership is constituted by an agreement which gives to the parties thereto not only a community in the profits but also in the capital. *Sawyer* v. *Bank*, 13.
2. An agreement between B. and S. set out that B. had employed S. as clerk to superintend B.'s store as long as the latter chose to employ him, S. to have half the net profits, and further declared that S. was a half owner of all the goods, moneys, accounts, notes, etc., belonging to the store: *Held*, that such agreement constituted a partnership, and S., as surviving partner, is entitled to collect the firm's bank balance. *Ibid.*
3. Upon the death of one partner the law vests the title to the partnership assets in the survivor in trust to pay the firm debts and divide the remainder between himself and the administrator of the deceased partner. *Weisel* v. *Cobb*, 22.
4. Where a surviving partner of a firm conveyed to "C., administrator" of the deceased partner, the assets of the firm to enable the said "C., administrator, to pay off all the debts and liabilities of the deceased partner, including the debts of the said firm, and to legally account for all such moneys as may come into his hands by virtue of this assignment": *Held*, that the assignor (the surviving partner) is entitled to bring suit against C. individually for an accounting of his trusteeship. *Ibid.*
5. The statute of limitations does not begin to run in favor of a member of a partnership who has indorsed the note of an outside

party to the firm until the appointment of a receiver to collect the assets or other settlement of the firm's affairs. *Loan Association* v. *Ferrell*, 301.

PARTIAL PAYMENT.

Partial payment on a judgment does not arrest the running of the statute of limitations. *Hughes* v. *Boone*, 54.

PAYMENT, Evidence of:

A bond to plaintiff by defendant's intestate found among the latter's papers, purporting to be for a balance due on the price of land, and containing a statement that upon its payment the payee should execute a deed to the maker, was admissible to prove payment, to the extent of the amount of the note, of an earlier and larger bond given for the price of the land, when accompanied by evidence of its presentment to plaintiff and of his declarations that the land had been paid for and that a credit indorsed on the note was a payment on the land, together with evidence that there was only one land transaction, although the description of the land in the bond so found was insufficient. *Allen* v. *Allen*, 121.

PEREMPTORY CHALLENGE OF JUROR: See "JURORS."

PERSON ON RAILROAD TRACK:

1. It is the duty of a railroad company in running its trains to keep a lookout on its track in order to discover and avoid any obstructions that may be encountered thereon, and if by reasonable watchfulness on the part of the engineer he might discover a person on the track in a perilous position and apparently insensible to danger, in time to avoid injury, and the engineer fails to keep such lookout and by reason thereof injury results, the railroad company is guilty of negligence for which action may be maintained, provided that the person injured has not been guilty of contributory negligence. *Smith* v. *Railroad*, 782.
2. In the absence of imminent danger the mere going upon the track is not contributory negligence, but it is the duty of a person to look and listen for the approach of the train, and if, by his failure to exercise such care, a collision occurs he will be deemed guilty of such contributory negligence as would bar an action for the injury. *Ibid.*

PLEADING:

1. Under *The Code*, as well as at common law, the facts constituting a cause of action or defence must be plainly set forth in the pleading. *Lassiter* v. *Roper*, 17.

2. A plea of the statute of limitations which contains no facts whatever, and which refers to no facts in the other parts of the pleading which lend any aid to the plea and from which any legal conclusions can be deduced, is defective. *Ibid.*

3. Although a counter-claim set up in an answer and admitted therein to be the subject of another action pending between the parties, will be abated upon the objection of the plaintiff by a proper pleading, yet such objection, if waived, cannot afterward avail the plaintiff. *Davis* v. *Terry*, 27.

4. A counter-claim for damages for the malicious prosecution of a prior action which fails to allege facts showing that the prosecution of such prior action was without probable cause, is bad. *Ibid.*

5. Where a defect of parties appears on the face of the complaint it it should be taken advantage of by demurrer; if such defect does not so appear, the defendant, in his answer, should set out the names of those who are necessary parties, to the end, in either case, that the Court, being thus informed, may decide, before the trial of issues of fact or law, that all necessary parties are present. *Johnson* v. *Gooch*, 62.

6. Where the complaint in an action to recover land alleges title and right of possession in the plaintiff proof that plaintiff is the owner of the equity of redemption in the land will permit a recovery as against a mere trespasser. *Arrington* v. *Arrington*, 116.

7. Where, in an action by a principal against an agent for money due by the latter, the complaint does not allege a demand and refusal, a demurrer on that ground will not lie when in the answer, which contains a demurrer, a general denial of indebtedness is made and the statute of limitations is pleaded. *Lamb* v. *Ward*, 255.

8. Where plaintiff being granted leave to amend his complaint and to reply to the answer and to answer the counter-claim which the latter set up, embodied an amendment to the complaint, a reply and an answer to the counter-claim in a pleading, and the defendant filed no other answer, but an issue was raised by the pleadings, it was error to refuse to submit the issue for the consideration of the jury. *Wiggins* v. *Kirkpatrick*, 298.

9. In an action on a note the answer averred that if the note was received at all by plaintiff it was "received coupled with and subject to all the equities" between defendant and the payee, and pleaded a counter-claim on account of defective title to the land for which the note was given; and the amended complaint denied the averment as to the defective title of the land: *Held*,

that issues were raised by the pleadings which ought to have been submitted to the jury. *Ibid.*

10. In an action begun as a proceeding for the re-allotment of homestead, but which, by consent of the judgment creditor and debtor and the mortgagees of the latter, had become one for the foreclosure of mortgages, the plaintiff caused the wife of the judgment debtor to be made a party defendant for the purpose of enabling her to assert any rights she might have; she filed an answer which tended to revive issues which had been finally adjudicated between plaintiff and her husband instead of setting up any rights of her own: *Held*, that such answer was immaterial and was properly disregarded by the Judge below. *Vanstory* v. *Thornton*, 375.

11. If, after an estoppel has arisen, the existence of the contrary fact is averred by one of the parties, the other may show it by pleading if it be not already apparent on the record; but if, having the opportunity to do so, he fail to plead and rely upon it, and answer to the fact and again put it in issue, the estoppel, when offered in evidence, loses its conclusive character and may be repelled by opposite proof. Where, however, the pleadings are general, as in actions of ejectment, etc., the party having opportunity to plead it, the estoppel retains its exclusive character, and the jury must find according to it. *Wilkins* v. *Suttles*, 550.

12. An allegation in a complaint that one purchased the land in controversy and paid for the same and was entitled to a grant from the State on the payment of the grant fees (where such land is a part of the "Cherokee Lands") is a sufficient declaration that the charges have been paid to the proper officer and that nothing remains to be done but to procure a grant from the Secretary of State in the usual way. *Wilson* v. *Deweese*, 653.

13. An allegation that "the administrators, in the administration of the estate of deceased, sold certain lands and assigned the certificate of survey, is not a sufficient averment of a sale under lawful authority, but in an action to recover such lands such insufficiency is cured by the allegation that the administrator obtained judgment on the notes given for the purchase of such lands and had the same sold under execution, for, in such case, the law presumes that the Court acted properly in rendering the judgment and will not permit it, or the sale made under it, to be attacked in an indirect and collateral way. *Ibid.*

PLEDGEE OF NOTE SECURED BY MORTGAGE:

R. & Co., holding a mortgage to secure a note and advances made and to be made, transferred the note before maturity to plaintiff as collateral security, and thereafter made an assignment to the defendant of all their property, including the mortgage, for the benefit of creditors; the mortgagors delivered a part of the crop covered by the mortgage to the defendant, who converted the same into money: *Held* (1), that the defendant assignee in respect to such transaction succeeds only to the rights of R. & Co., his assignors; (2), that plaintiff, assignee of the note, is entitled to have the money applied on the note in preference to the account for advances. *Walton & Whann Co.* v. *Davis*, 104.

POLICE POWER:

1. The Legislature may declare it unlawful for any minor to enter a bar-room. *State* v. *Austin*, 855.
2. The Legislature may transfer to municipal bodies created by it the duty and responsibility of exercising a portion of its own police power in such manner as the commissioners may deem necessary. *Ibid.*

POSSESSION:

1. Where the boundaries of two grants or deeds lap upon each other the constructive possession of his entire boundary remains in him who has the better title, even without any actual possession whatsoever, until the claimant under the junior grant occupies the lappage. *Boomer* v. *Gibbs*, 76.
2. Possession of part of the lappage by the one having the inferior title gives constructive possession of the whole lappage so long as the one having the better title has not actual possession of any part. *Ibid*
3. The test of the sufficiency of possession of land to mature title is the liability of the occupant to an action of trespass in ejectment. *Ibid.*
4. In an action to recover land the plaintiff must have the right to the possession not only at the institution of the suit but at the time of the trial also; hence, in the trial of such an action, where it appeared that the plaintiff had at the commencement of the action only an equity of redemption in the land, it was error to exclude testimony tending to show that between the commencement of the action and the trial the plaintiff had lost her equitable title. *Arrington* v. *Arrington*, 116.

POSSESSION, Constructive:

The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State (*The Code*, §139, subd. 2)—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. *Hamilton* v. *Icard*, 532.

PRACTICE:

As to Appeals (see, also, "Appeals"):

1. Where appellant's counsel, five days after the adjournment of Court, mailed by registered letter notice of appeal, statement of case, and copies and fees to the Sheriff of the county at the county-seat, so as to leave ample time for service on appellee's counsel, who resided at that place, the failure of the Sheriff to take the notice, etc., from the post-office until after the ten days allowed for service cannot be imputed to the appellant as his laches. *Arrington* v. *Arrington*, 113.
2. In such case, where the facts are not disputed, the case will be remanded and the appellee will be allowed five days after the certificate of this Court is filed in the Court below to file exceptions to the appellant's case on appeal *nunc pro tunc*, and in default of an agreement the Judge who tried the cause will settle the case. *Ibid.*
3. Where no case on appeal accompanies the record, and no error is apparent on the face of the latter, the judgment below will be affirmed. *Maggett* v. *Roberts*, 227; *Fertilizer Co.* v. *Black*, 591.
4. The time within which a case and counter-case on appeal must be served being prescribed by statute, the Courts cannot prescribe a different method by extending the time, but this can only be done by consent of the parties if admitted or reduced to writing or entered on the minutes or docket. *Rosenthal* v. *Roberson*, 594.
5. The time for service of a case on appeal must be computed from the day of the actual adjournment of the Court, and not from the last day to which a term of Court could be extended. *Ibid.*
6. Service of a case on appeal after the expiration of the time allowed for the same is a nullity. *Ibid.*
7. Although the absence of a case on appeal is not ground for a motion to dismiss, the judgment will be affirmed unless errors appear on the face of record proper. *Ibid.*
8. Where the appellant is a plaintiff who has submitted to a nonsuit, there can be no error in the record proper which could avail him. *Ibid.*
9. Where no judgment was entered below an appeal from a judgment of nonsuit will be dismissed. *Ibid.*

As to Attachments:

1. The Court has power to permit amendment of an affidavit in attachment proceedings which was insufficient as failing to state how the debt arose, and from an order granting such amendment no appeal lies. *Cook* v. *Mining Co.*, 617.

2. An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. *Ibid.*

3. Parties who intervene in attachment proceedings cannot be heard to object to the irregularity of the same, that being a matter between the parties to the main action. *Ibid.*

4. Where the enforcement of a debt or other liability is sought by subjecting property of a non-resident, the jurisdiction is based upon the seizure of the property and only extends to the property attached; and no personal judgment can be rendered against the defendant, not even for the costs, or affecting other property within the State. *Long* v. *Insurance Co.*, 465.

As to Judgments:

1. Where, after a decree ordering a sale of land, in a suit to foreclose a mortgage, the defendant mortgagor died and his heirs were not made parties and the sale was made and confirmed without notice to the heirs, the decree confirming the sale was irregular but not void. *Everett* v. *Reynolds*, 366.

2. The proper remedy to have an irregular judgment, though final, set aside is by a motion in the cause. *Ibid.*

3. A motion to set aside an irregular judgment confirming the sale of land in foreclosure proceedings will not be allowed where there is nothing to indicate that the parties have been or may be prejudiced thereby. *Ibid.*

4. Although not altogether orderly, yet it is not error to render judgment on the debt claimed in the main action before the trial of issues raised in proceedings ancillary thereto. *Allison* v. *Maddrey*, 421.

5. An action brought in one county to correct a judgment rendered in another cannot be treated as a motion in the cause. *Rosenthal* v. *Roberson*, 594.

6. Where the summons in an action was served upon "W. A. F.," who was named in the summons, the fact that a judgment was rendered against "W. H. F." does not necessarily vitiate it or render it void; but it may be corrected by motion in the cause, and is expressly allowed at any time by section 273 of *The Code*, and need not be made within a year after notice thereof. *Ibid.*

7. An order or judgment made by consent cannot be vacated or modified, even at the term at which it is entered, without the consent or acquiescence of all parties to the action, unless it

appear affirmatively that its rendition was procured by the mutual mistake of all the parties or by fraud. *Deaver* v. *Jones*, 649.

8. Where, in the trial of an action, the verdict of a jury was set aside by consent, it was error to re-instate the verdict despite the objection of one of the parties, it not appearing affirmatively that the first order was procured by fraud. *Ibid.*

AS TO PROCEEDINGS FOR DRAINING LOWLANDS:

1. Chapter 253, Acts of 1889, concerning the drainage of lowlands, does not expressly repeal section 1298 of *The Code*, providing for the duty of commissioners, but leaves in operation such of the provisions as are not repugnant to such Act of 1889. *Worthington* v. *Coward*, 289.

2. Upon the hearing of the report of commissioners appointed to lay off a ditch for draining lowlands it was error in the Clerk to refuse to hear witnesses offered by parties excepting to the report, on the ground that he could not legally do so. *Ibid.*

3. On appeal from the judgment of the Clerk upon the report of commissioners to lay off ditch for draining lowlands, the Judge can set aside the report either for cause or in his discretion if, in his opinion, the ends of justice can be subserved thereby. *Ibid.*

AS TO SPECIAL APPEARANCE:

1. Where a defendant appears specially to move to dismiss the action and notes an exception to the refusal of his motion, his subsequent appearance to the merits waives no right to have the refusal of his motion to dismiss reviewed on appeal. *Mullen* v. *Canal Co.*, 8.

2. The finding of the Court below that an appearance entered by a defendant in an action was a special appearance is not reviewable in this Court. *Long* v. *Insurance Co.*, 465.

AS TO SERVICE OF SUMMONS:

1. Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, and, hence, actual service in another State "in lieu of publication" would be invalid. *Long* v. *Insurance Company*, 465.

2. The service of summons and other process which ch. 120, Acts of 1891, authorizes to be made upon a non-resident by an officer of the county and State where he resides is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to-wit, in actions which are virtually

proceedings *in rem* or *quasi in rem*, and in which the jurisdiction as to non-residents only authorizes a judgment acting upon the property. *Ibid.*

AS TO WRIT OF PROHIBITION:

1. The writ of prohibition which existed at common law and is authorized by Art. IV, sec. 8 of the Constitution, can only be issued from the Supreme Court. *State* v. *Whitaker*, 818.
2. The writ of prohibition does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal, *recordari* or *certiorari*, and hence will not issue to prevent a Mayor's Court from proceeding to try a warrant for an alleged violation of a city ordinance, where such Court has jurisdiction of the persons and subject-matter and the alleged invalidity of the ordinance can be determined on appeal. *Ibid.*
3. Where a petition for a writ of prohibition is entertained the usual practice, unless prior notice of the petition has been given, is to issue a notice to the lower Court to show cause why the writ should not issue and to stay proceedings in the meantime. *Ibid.*

GENERALLY:

1. A Clerk having jurisdiction of a petition for partition, the transfer thereof to term for trial of issues raised by the pleadings transferred the jurisdiction to the Judge, and his denial of a motion for leave to amend the petition upon the ground that he had no power to grant it was error. *Godwin* v. *Early*, 11.
2. Under *The Code*, as well as at common law, the facts constituting a cause of action must be plainly set forth in the pleading. *Lassiter* v. *Roper*, 17.
3. Where a defect of parties appears on the face of the complaint it should be taken advantage of by demurrer; if such defect does not so appear the defendant, in his answer, should set out the names of those who are necessary parties, to the end, in either case, that the Court, being thus informed, may decide, before the trial of the issues of fact or law, that all necessary parties are present. *Johnson* v. *Gooch*, 62.
4. Where, in a pending suit, one of the parties asks for the appointment and joinder in the suit of a trustee for the applicant in the place of a deceased trustee, the appointment so made is binding only on the party so requesting it. *Ibid.*
5. Where an action was brought on the official bond of a Clerk of the Superior Court in the name of the parties injured by a breach thereof, it was not error in the Court below to permit an amendment of the summons by the insertion of the words "The State

on relation of" after the pleadings were filed. *Forte* v. *Boone*, 176.

6. By agreement of counsel a motion made at the trial term to set aside a verdict on the ground of excessive damages may be heard and determined by the same Judge at a subsequent time. *Myers* v. *Stafford*, 231.
7. The fact that an appeal was perfected pending a motion to set aside a verdict, the hearing of which had been postponed by consent to a subsequent term of Court, did not debar the Judge below from hearing and determining such motion at the time appointed. *Ibid.*
8. A will made in another State will be construed according to the common law as expounded by the decisions of this Court, in the absence of proof that a different law or construction prevails in such other State. *Benbow* v. *Moore*, 263.
9. Where two of several plaintiffs died, and there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding Judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. *Coggins* v. *Flythe*, 274.
10. Upon an application for an injunction and a receiver it is not necessary for the Judge to "find the facts" further than to examine the affiavits and determine whether sufficient cause is shown for the ancillary relief. *Bank* v. *Bridgers*, 381.
11. Where the record showed a complaint stating a cause of action against all of the defendants an answer purporting to be the answer of all the defendants and setting up a common defence, and a judgment at the return term reciting service of summons on the defendants and rendered against two of the defendants for failure to answer: *Held*, there was error on the face of the record. *Fertilizer Co.* v. *Black*, 591.
12. Where an indictment is of doubtful validity it is proper practice to send a second bill at the same term at which the first stood for trial. *State* v. *Lee*, 844.

PRESUMPTION OF PAYMENT OF LEGACIES:

1. Where twenty years have elapsed between the time when suit might have been instituted for the recovery of legacies and the

actual date of suit the law will, for the sake of repose and to discourage stale claims, raise a presumption that the legacies have been paid or satisfied, or that the claim therefor has been abandoned. *Cox* v. *Brower*, 422.

2. Such presumption would not be rebutted although it should be shown that the interval between the death of the legatee and the appointment of an administrator had been sufficient to reduce the period during which there was a person to bring action to less than twenty years. *Ibid.*

3. The fact that a legatee was at the time of the death of the testator a non-resident of the State will not excuse his laches and delay in bringing suit, since he had the right to sue and the Courts were at all times open to non-residents as well as residents of the State. *Ibid.*

PRESUMPTION OF PREMEDITATION FOR USE OF DEADLY WEAPON:

The use of a weapon likely to produce death raises a presumption of malice only, and not of premeditation and deliberation. (CLARK, J., dissenting). *State* v. *Fuller*, 885.

PRINCIPAL AND AGENT, 255:

1. Where, under an agreement between plaintiff bank and its correspondent N. H. Bank it was agreed that the latter should collect commercial paper and checks forwarded it by the plaintiff for a commission and remit daily for the proceeds, the relation of principal and agent as to any paper ceased on its collection and the relation of creditor and debtor arose immediately as to the cash (or its equivalent). *Bank* v. *Davis*, 343.

2. Where, under such agreement, the proceeds of such collections were mingled with the proceeds of the N. H. Bank, the cashier of which had no knowledge of its insolvency until its failure, the N. H. Bank cannot, upon its failure, be chargeable with a conversion of plaintiff bank's funds, since, in the absence of such knowledge on the part of the cashier, the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in full force until the failure. *Ibid.*

3. An attorney to whom a note is sent for collection has, *prima facie*, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. *Sherrill* v. *Clothing Co.*, 436.

4. In such case the acquiescence by the client in such indorsement, supposing it to have been a mere sale of the note, does not constitute a ratification of the unauthorized indorsement. *Ibid.*

PRIVY EXAMINATION OF WIFE:

The privy examination of a wife, as to the execution by her of a deed, taken in one county by a Justice of the Peace resident in another county, is invalid. *Dixon* v. *Robbins*, 102.

PROBATE:

1. Where the certificate of the Probate Court did not state that the execution of a mortgage had been acknowledged by the grantor or proved by a witness, but merely recited that the mortgagee had "procured the same to be proved by this Court," the presumption is that the probate was properly taken. *Quinnerly* v. *Quinnerly*, 145.

2. Where an acknowledgment of a deed was made before an officer authorized to take it and was, in fact, in due form the adjudication by the Clerk of the Superior Court of the county where the land lies that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," is sufficient although not following the words of the statute (section 1246 (3) of *The Code*) that it is in due form. *Deans* v. *Pate*, 194.

PERSON WALKING ON TRACK OF RAILROAD, 697.

PROCESS, Service of:

1. The method of mailing process to the Sheriff of the county and State where a non-resident defendant resides, to be served upon him (as provided by ch. 120, Acts of 1891), is optional and not exclusive of service by publication in cases in which this last is proper. *Mullen* v. *Canal Co.*, 8.

2. Service of process by publication based on an attachment issued in an action for unliquidated damages is invalid, except in cases specified in *The Code*, §347, and amendatory act, ch. 77, Acts 1893. *Ibid.*

PROFITS: See "PARTNERSHIP."

PROHIBITION, Writ of: See "PRACTICE AS TO WRIT OF PROHIBITION."

PROSECUTOR:

1. A finding by the trial Judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." *State* v. *Baker*, 812.

2. In such case the person marked as prosecutor on a bill before it was acted on by the grand jury was properly adjudged liable for the costs. *Ibid.*

PROXIMATE CAUSE OF INJURY:

Where plaintiff and defendant were both concurrently negligent and the negligence of the former was the proximate cause of injury to the plaintiff, the latter cannot recover damages for the same. *Mason* v. *Railroad*, 718.

PUBLIC INTEREST:

A finding by the trial Judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." *State* v. *Baker*, 812.

PUBLIC NECESSITY, Water-works, 178.

PUBLIC ROAD:

1. The fact that a defendant, in a prosecution for failure to work the public road, had no occasion to use the road to which he was assigned to duty is no defence. *State* v. *Gillikin*, 832.

2. The assignment of one liable to road duty to any particular road rests with the Board of Supervisors of the township. *Ibid.*

PUBLIC ROAD, Proceedings to establish, 683.

PURCHASE-MONEY:

1. Notes of a married woman given for the purchase of land will be declared a charge thereon when she sets up her coverture as a defence. *Draper* v. *Allen*, 50.

2. No lien for unpaid purchase-money exists in this State in favor of a vendor of land who has conveyed the same. *Quinnerly* v. *Quinnerly*, 145.

PURCHASER, Bona fide, 151:

Plaintiff bank rediscounted for N. Bank, along with other notes, a note of the defendants (against which the latter claimed an equity) and placed the proceeds to the credit of N. Bank, and before receiving notice of the equity paid checks of N. Bank to the extent of half of the proceeds of such rediscount: *Held*, that plaintiff was a purchaser of such note for value, although between the date of such rediscount and notice of the equity plaintiff had credited other items to N. Bank and at time of such notice owed the latter more than the proceeds of the rediscount. *Bank* v. *McNair*, 335.

PURCHASER WITHOUT NOTICE OF TAXES IN ARREARS:

The Act of 1891, ch. 391, authorizing the sale of land for taxes in arrears for the years 1881 to 1886, inclusive, provided that such sale should not affect purchasers of land who had no notice of such unpaid taxes; M., the assignee of a mortgage on land, had, at the time of the transfer to him, no notice that there were any unpaid taxes due on the mortgaged land, but at the time and prior to the sale of the land under foreclosure proceedings at which he bought he had such notice: *Held*, that, as the title acquired at a foreclosure sale relates back to the date of the execution of the mortgage, the land was not liable for taxes assessed against it before the date of the mortgage. *Moore* v. *Sugg*, 292.

PURCHASE OF NOTE WITHOUT NOTICE OF SURETYSHIP OF A SIGNER, 509.

PURCHASER OF BONDS VOTED BY TOWN: See "MUNICIPAL BONDS," 453.

RAILROAD COMPANIES, 690, 692, 697, 725, 728:

1. If the engineer of a railroad company by the exercise of reasonable care and prudence can discover a child, without discretion and intelligence, on the track in time to stop the train, or can, with the exercise of reasonable or ordinary care and prudence, discover that a small child is going towards the track or running near so as to make it probable that it will go on the track, and such discovery can be made in time to stop the train, it is the duty of the engineer to stop and negligence in the company if he does not stop. *Bottoms* v. *Railroad*, 699.
2. A conductor of a railroad company's train is, as to those subject to his orders on the same train, a vice-principal acting for the company. *Mason* v. *Railroad*, 718.
3. Duty of engineer of railroad to keep lookout on track, 728.
4. Subscription to capital stock of railroad companies by a town, 453.

RATIFICATION OF UNAUTHORIZED ACT:

1. Ratification is equivalent to a previous authority; therefore the ratification by a city of an act done by an unauthorized person to the injury of another, but which, if done by the city, would have been rightful, relieves such person from liability as a trespasser although the ratification was after suit brought by the injured party. *Wolfe* v. *Pearson*, 621.
2. Where defendant, assuming to act for a city, changed the grade of a street and removed therefrom plaintiff's wall, which encroached thereon so as to constitute a nuisance, and the city ratified his

acts after suit brought, plaintiff could only recover damages resulting during the time between the act and the ratification. *Ibid.*

REAL ESTATE BROKER:

1. Where a real estate agent negotiated a sale of land for a person who agreed with him in writing to convey it to the purchaser who was to pay the agent's commissions and such person refused to convey it, the agent may recover in an action for the breach of the contract by showing that the intending purchaser was able and willing to carry out the trade. *Atkinson* v. *Pack*, 597.
2. The measure of damages for such breach of contract is the amount the agent would have received as commissions from the purchaser if the bargain had been complied with by the defendant. *Ibid.*

RECEIVER:

1. Upon an application for an injunction and receiver it is not necessary for the Judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. *Bank* v. *Bridgers*, 381.
2. Where the insolvency of a trustee in a deed of assignment was questioned and it was positively alleged by the plaintiff, and the defendants simply alleged their belief that he was not insolvent, and, upon being required to give bond, the trustee refused so to do: *Held*, that it was proper to appoint a receiver to take charge of the assigned estate pending the litigation. *Ibid.*

RECEIVER OF INSOLVENT CORPORATION:

1. One to whom an insolvent bank made an assignment of its assets, and who on the same day and at the suit of creditors was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment but as an officer of the Court appointed to settle and wind up the affairs of such insolvent bank. *Davis* v. *Manufacturing Co.*, 321.
2. Under section 668 of *The Code* a receiver of an insolvent corporation may sue either in his own name or in the name of the corporation, and in such suit all the rights of the parties, both legal and equitable, pertaining to the matters set out in the pleadings, may be adjudicated. *Ibid.*

RECORD, Amendment of: See "AMENDMENT" (3).

RECORD, Transcript of as evidence: See "EVIDENCE" (10) and (11).

REGISTER OF DEEDS:

A Register of Deeds who issues license for the marriage of a female under eighteen years of age, after being informed and believing that her father is dead and after obtaining the written consent of her mother, will be considered as having made such reasonable inquiry as contemplated by the statute. *Joyner* v. *Roberts*, 389.

REGISTRATION:

1. No notice to a purchaser of land, however full and formal, will supply the place of registration; therefore, a mortgage given for the purchase-money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. *Quinnerly* v. *Quinnerly*, 145.
2. The *filing* of a deed for registration is in itself constructive notice, and the failure of the Register of Deeds to index it cannot impair its efficacy if actually registered. *Davis* v. *Whitaker*, 279.
3. Under "Connor's Act" (ch. 147, Acts of 1885), which provides that no conveyance of land or contract to convey shall be valid as against purchasers for value but from the registration thereof, actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered. *Maddox* v. *Arp*, 585.

REGISTRATION OF DEEDS, Priority, 560.

RELATIONSHIP:

Near relationship between the parties to a transaction alleged to be fraudulent is not *prima facie* evidence of fraud. *Bank* v. *Bridgers*, 383.

REMOVAL OF CAUSES: See "JURISDICTION" (2).

REPUDIATION OF CONTRACT:

What is not, 27.

What is, 661.

RESERVATION IN DEED:

A widow conveyed the portion of a tract of land allotted to her as dower by a deed purporting to be in fee-simple; the guardian of the heir, having procured an order of Court for the purpose, sold and executed a deed to the purchaser for the entire tract, embracing the dower portion, but with a reservation as follows: "Reserving the right of dower of the widow, etc., which has heretofore been sold and conveyed": *Held*, that the reservation in the deed by the guardian of the dower right "already conveyed" was a reservation only of what interest the widow had legally conveyed and was not a reservation of the fee-simple in the dower portion. *Bird* v. *Cruse*, 435.

RES GESTÆ: See "EVIDENCE" (19).

RESIDENT TAX-PAYERS:

The fact that petitioners for an election to be held upon the question of subscribing by a town to the stock of a railroad company styled themselves "voters and tax-payers" instead of "resident tax-payers," as provided in the act of Assembly, is immaterial. *Claybrook* v. *Commissioners*, 453.

RETAILING LIQUOR WITHOUT LICENSE:

1. Although the act of selling liquor without license in violation of the revenue laws of the State and of its police regulations, and also of the ordinance of a city, is *one* act, the offences are different, for which the offender must answer in the proper jurisdictions; therefore an ordinance of a city imposing a fine or penalty for selling liquor without license does not conflict with the general laws of the State prohibiting the sale of liquor without license, and is therefore valid. *State* v. *Stevens*, 873.
2. Such ordinance being valid, and the violation of it being made by statute a misdemeanor of which a Mayor has jurisdiction, a prosecution under it does not conflict with any criminal action pending or that may be instituted against the defendant on account of the alleged selling as an act in violation of the general State law. *Ibid.*

RETROACTIVE STATUTES: See "STATUTES."

REVIVOR OF JUDGMENT: See "JUDGMENT LIEN" (3).

RIGHT OF WAY:

The existence of a railroad corporation cannot be questioned in an action brought by it to condemn right of way. *Railroad Co.* v. *Lumber Co.*, 690.

RIPARIAN RIGHTS:

Riparian rights being incident to land abutting on navigable water cannot be conveyed without a conveyance of such land, and lands covered by navigable water are subject to entry only by the owner of the land abutting thereon. *Zimmerman* v. *Robinson*, 39.

SALE:

Of land for taxes, 292.

Under deed of trust, 474.

Under execution on dormant judgment, void, 558.

SANITY:

While testimony as to mental capacity falls within the exception to the rule that no witness, other than qualified experts, shall be allowed to express his opinion in a matter submitted to the inquiry of a jury, yet insanity cannot be proved by general reputation or hearsay. *State* v. *Coley*, 879.

SCHOOL FUND:

It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools (Const., Art. 9, sec. 2), and while it is the duty of the Board, under Sec. 10 of Article 9 of the Constition, to make needful rules and regulations concerning the educational fund, it has no power and cannot be compelled by *mandamus* to apportion money raised by taxation in the different counties for school purposes and held in the treasuries of such counties for expenditure according to the apportionment made by the General Assembly. *Board of Education* v. *State Board of Education*, 313.

SEAL AFFIXED TO PARTNERSHIP NAME:

A seal not being necessary to the due execution of a mortgage on personal property, the affixing of one to the firm name signed to a deed of trust of personal property does not invalidate the conveyance. *Pipe and Foundry Co.* v. *Woltman*, 178.

SECRECY:

While secrecy is usually a part of the evidence of felonious intent it is not such an essential accompaniment of larceny as to require the State, in every instance, to prove an attempt to conceal the taking. *State* v. *Hill*, 780.

"SEPARABLE CONTROVERSY," 429.

SERVICE BY PROCESS:

1. Service by an officer means an officer authorized generally and by virtue of his office to serve process of the Court in which the action is pending. *Forte* v. *Boone*, 176.
2. A town constable has no authority, under section 3810, as construed with section 644, to serve any papers for the Superior Court except process; an appellant's case on appeal from the Superior Court is not *process;* hence, service of a case on appeal by a town constable is a nullity. *Ibid.*

SERVICE OF PROCESS BY PUBLICATION:

1. The method of mailing process to the Sheriff of the county and State where a non-resident defendant resides, to be served upon him (as provided by ch. 120, Acts 1891), is optional and not

exclusive of service by publication in cases in which this last is proper. *Mullen* v. *Canal Co.*, 8.

2. Service of process by publication based on an attachment issued in an action for unliquidated damages is invalid, except in cases specified in *The Code*, §347, and amendatory act, ch. 77, Acts 1893. *Ibid.*

SERVICE OF CASE ON APPEAL:

1. The time within which a case and counter-case on appeal must be served being prescribed by statute, the Courts cannot prescribe a different method by extending the time, but this can only be done by consent of the parties if admitted or reduced to writing or entered on the minutes or docket. *Rosenthal* v. *Roberson*, 594.
2. The time for service of a case on appeal must be computed from the day of the actual adjournment of the Court and not from the last day to which a term of Court could be extended. *Ibid.*
3. Service of a case on appeal after the expiration of the time allowed for the same is a nullity. *Ibid.*

SET-OFF:

1. After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver's right to set-off claims the bank may have against the creditor, and if the assignee of the claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. *Davis* v. *Industrial Manufacturing Co.*, 321.
2. The effect of the insolvency of a bank closing its doors and stopping its business is to make all its deposit accounts and certificates of deposits at once become due without demand or notice, and in settling its affairs equity and justice require that the receiver shall deduct from the amount due a creditor all sums for which he is a debtor and shall allow a debtor credit for all sums for which he is creditor. *Ibid.*
3. Where one of several indorsers of a note of an insolvent debtor to an insolvent bank is also a creditor of such bank he is entitled to avail himself of his claim in settlement of his proportionate part of his liability on such note, which will be less or greater according to the solvency or insolvency of the other indorsers. *Ibid.*

SHADE TREES:

Right of city authorities to cut down shade trees on street or sidewalk, 392.

SPECIAL APPEARANCE:

1. Where a defendant appears specially to move to dismiss the action and notes an exception to the refusal of his motion, his subsequent appearance to the merits waives no right to have the refusal of his motion to dismiss reviewed on appeal. *Mullen* v. *Canal Co.*, 8.
2. The finding of the Court below that an appearance entered by a defendant in an action was a special appearance is not reviewable in this Court. *Long* v. *Insurance Co.*, 465.

SPECIAL VERDICT:

A special verdict in which, after setting out the facts, the jury say: "If upon these facts the Court be of the opinion that the defendant is guilty, the jury so find, otherwise not guilty," is sufficient as following approved precedents. *State* v. *Gillikin*, 832.

SPECULATIVE DAMAGES, 70.

SPLITTING UP ACCOUNTS, 528.

STALE CLAIMS, 422.

STATE BOARD OF EDUCATION:

It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools (Const., Art. 9, sec. 2), and while it is the duty of the Board, under Sec. 10 of Article 9 of the Constitution, to make needful rules and regulations concerning the educational fund, it has no power and cannot be compelled by *mandamus* to apportion money raised by taxation in the different counties for school purposes and held in the treasuries of such counties for expenditure according to the apportionment made by the General Assembly. *Board of Education* v. *State Board of Education*, 313.

STATUTES:

1. A statute operates prospectively only and never retroactively unless the legislative intent to the contrary is made manifest either by the express terms of the statute or by necessary implication. *Greer* v. *Asheville*, 678.
2. An amendment to the charter of a city providing that the City Marshal shall hold office during good behavior does not have the effect of enlarging the term of office of one who was previously elected to hold during the term of the aldermen. *Ibid.*
3. The term of office of a City Marshal appointed under a charter providing that marshals should hold office during the official term of the aldermen is not enlarged from one to two years by an amendment to the charter extending the term of the aldermen from one to two years. *Ibid.*

STATUTE OF LIMITATIONS:

1. A plea of the statute of limitations which contains no facts whatever, and which refers to no facts in the other parts of the pleading which lend any aid to the plea and from which any legal conclusions can be deduced, is defective. *Lassiter* v. *Roper*, 17.
2. A partial payment made on a judgment does not arrest the running of the statute of limitations. *Hughes* v. *Boone*, 54.
3. Section 164 of *The Code*, allowing the personal representative of a decedent to sue, does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. *Ibid.*
4. Section 168 of *The Code*, which suspends the statute of limitations during the pendency of a contest over the probate of a will, applies only where there is no administrator or collector during the contest. *Ibid.*
5. The lien of judgments docketed in 1873 and 1875 was not barred in 1891 where a homestead had been allotted to a judgment debtor. *Leach* v. *Johnson*, 87.
6. When money is received by one to manage for another, paying the latter six per cent. and keeping the profits in excess thereof, the statute of limitations does not begin to run until after demand. *Lamb* v. *Ward*, 255.
7. The lapse of three years protects the surety on a sealed instrument. *Coffey* v. *Reinhart*, 509.
8. Although a bond is joint and several on its face, the suretyship of an obligor may be shown by parol, but to obtain protection by the lapse of three years the surety must show that his relation was known to the creditor *Ibid.*
9. If the suretyship of the surety is known to the original payee and the note be assigned after maturity the surety will be protected by the lapse of three years after maturity, although the assignee takes without notice; otherwise if the note be assigned before maturity to one without notice. *Ibid.*
10. If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Ibid.*
11. Under *The Code*, §141, providing that no action shall be had against one who has been in possession of land, under color of title, for seven years, by one having right or title thereto, except during the seven years next after his right or title shall have descended or accrued, the statute begins to run against one to whom a grant of the land has been made only from the time of the grant. *Hamilton* v. *Icard*, 532.

12. The statute of limitations does not begin to run in favor of a member of a partnership who has indorsed the note of an outside party to the firm until the appointment of a receiver to collect the assets or other settlement of the firm's affairs. *Loan Association* v. *Ferrell*, 301.

STOCKHOLDER:

1. Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defence that the corporation was not legally organized. *Cotton Mills* v. *Burns*, 353.

2. Where articles of agreement signed by a subscriber to the stock of a corporation provided that the installments falling due on the subscription should bear eight per cent. interest, such rate continues until actual payment. *Ibid.*

STREETS:

1. Under section 3803 of *The Code*, applicable to all towns and cities, in the absence of other modes provided specially by charter, giving authority to keep in proper repair the streets, etc., of the towns, and by the charter of Asheville (chapter 111, Private Acts 1883), which gives authority to provide for repairing the streets, removing nuisances, and to condemn land for opening, widening and straightening streets, the city of Asheville has authority to change the grade of a street. *Wolfe* v. *Pearson*, 621.

2. A city is liable for damages caused by grading streets only when the work is done in an unskillful manner. *Ibid.*

3. Where defendant, assuming to act for a city, changed the grade of a street and removed therefrom plaintiff's wall, which encroached thereon so as to constitute a nuisance, and the city ratified his acts after suit brought, plaintiff could only recover damages resulting during the time between the act and the ratification. *Ibid.*

STREETS, Control of by municipal authority:

1. A city has exactly the same rights in and is under the same responsibilities for a street which it controls by dedication only as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned. *Tate* v. *Greensboro*, 392.

2. The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. *Ibid.*

3. The charter of the city of Greensboro and the general law of the State (*The Code*, ch. 62, Vol. II) give to the municipal authorities of that city wide discretion in the control and improvement of its streets, and if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria. Ibid.*

4. The Courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion. *Ibid.*

5. The power given to a city over the streets can be delegated to a street committee composed of members of the Board of Aldermen, and the members of such committee, acting as such and within the limits of the power of the city, are not answerable, individually, for damage resulting from their acts. *Ibid.*

STREETS, Duty of persons or corporations using, 203.

STREET-RAILWAYS:

The legislative charter of a street-railway company granting to it certain powers and privileges, and "such other privileges as may be granted by the municipal authorities of a town," gave such authorities no power to grant *exclusive* privileges to the railway company. (*Quære,* whether the Legislature has the right to authorize a city to grant such exclusive privileges). *Railway* v. *Railway*, 725.

SUBSCRIBER TO CAPITAL STOCK:

Where a corporation wrote to H. offering to buy his land for a certain amount of its capital stock, and he replied assenting to the offer upon the condition that he should reserve all the wood and timber on the land, and the directors on the same day voted to accept his proposition but such acceptance was not communicated to him, and about nine months thereafter H. withdrew his proposition, and there was no evidence that the stock was delivered or title made or any further action taken by either party in pursuance of such correspondence: *Held*, that there was no contract by which H. became a stockholder of the corporation. *Cozart* v. *Herndon*, 252.

SUMMONS, Service of:

1. The service of summons and other process which ch. 120, Acts of 1891, authorizes to be made upon a non-resident by an officer of the county and State where he resides, is "in lieu of publication

in a newspaper," and can only be made in those cases where publication could be made, to-wit, in actions which are virtually proceedings *in rem* or *quasi in rem*, and in which the jurisdiction as to non-residents only authorizes a judgment acting upon the property. *Long* v. *Insurance Co.*, 465.

2. Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, and hence actual service in another State "in lieu of publication" would be invalid. *Ibid.*

SUPPLEMENTARY COMPLAINT, When allowed, 275.

SURETY:

1. A married woman whose land is mortgaged as security for her husband's debt has the rights of a surety, and is entitled to have his lands, included in the same mortgage, exhausted to the exoneration of hers. *Weil* v. *Thomas*, 197.
2. Where one of several indorsers of a note of an insolvent debtor to an insolvent bank is also a creditor of such bank he is entitled to avail himself of his claim in settlement of his proportionate part of his liability on such note, which will be less or greater according to the solvency or insolvency of the other indorsers. *Davis* v. *Industrial Manufacturing Co.*, 321.
3. The lapse of three years protects the surety on a sealed instrument. *Coffey* v. *Reinhart*, 509.
4. Although a bond is joint and several on its face the suretyship of an obligor may be shown by parol, but to obtain protection by the lapse of three years the surety must show that his relation was known to the creditor. *Ibid.*
5. If the suretyship of the surety is known to the original payee and the note be assigned after maturity, the surety will be protected by the lapse of three years after maturity, although the assignee takes without notice; otherwise if the note be assigned before maturity to one without notice. *Ibid.*
6. If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Ibid.*
7. Where the payee (whether original or by a previous indorsement) of a note assigns or transfers it by indorsement he becomes simply an indorser and, by section 50 of *The Code*, liable as a surety unless by the terms of the assignment he limits his liability; if he intends to transfer the title only he should use the words

"without recourse" or other phrase of similar import. *Davidson* v. *Powell*, 575.

8. An indorsement, "I assign over the within note to P.," does not limit the indorser's liability as such. *Ibid.*

9. While, if the note be in the hands of the original payee, an indorsement may be shown to have been made upon certain conditions, yet a *bona fide* holder for value, before maturity and without notice, is not affected by any equities existing between the original parties, and the same rule applies between the last payee and all subsequent indorsers. *Ibid.*

10. The burden of proof is upon an indorser to show any agreement by which his liability was restricted. *Ibid.*

SURVEY, 76:

1. The natural order of survey being that which a deed shows the parties thereto adopted to identify, to their own satisfaction, the land intended to be conveyed, the true rule in a subsequent survey to establish boundaries is to run with the calls in regular order from a known beginning, following course and distance, and the method of ascertaining a previous line in the order of description by reversing cannot be resorted to unless by that method a greater certainty of identification of such prior line can be obtained than the deed itself gives in its description of that line. *Norwood* v. *Crawford*, 513.

2. Where, in a description in a deed, the point of beginning and the three last corners were monuments, and, in running in regular order by courses and distances the several lines between the point of beginning and the second monument, the line from the corner next preceding such monument to such monument passed outside the monument, the true rule was to run such line to the monument, disregarding course and distance, and not to survey the lines from the point of beginning in reverse order. *Ibid.*

3. Under Acts 1893, ch. 22 ("An act to enable owners of land to establish the boundary lines thereof"), the surveyor appointed by the Clerk is not a referee, and his report should not contain conclusions of law. (Duties of surveyor under the act discussed by AVERY, J.). *Ibid.*

SURVEYOR, Duties of: See "SURVEY."

SURVIVING PARTNER: See "PARTNERSHIP."

TAXES:

1. It is incumbent on a mortgagee to see to it that the land mortgaged is listed for taxes and that the taxes be paid. *Wooten* v. *Sugg*, 295.

2. Land sold on a foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. *Ibid.*

3. There is no exemption of any property whatever from the payment of taxes. *Wilmington* v. *Sprunt*, 310.

TAXES, Garnishment for, 310.

TAX-LIST:

A tax-list in the hands of the collecting officer has the force of a judgment and execution. *Wilmington* v. *Sprunt*, 310.

TELEGRAM, Action for failure to deliver, 440:

Where one in consequence of a mistake in the transmission of a telegraphic message was induced to sell property at a less price than he could thereafter have sold it for, but did receive its then market value, he suffered no damage for which an action will lie beyond the cost of the telegram. *Hughes* v. *Western Union Telegraph Co.*, 70.

TERM OF OFFICE, 923:

1. An amendment to the charter of a city providing that the City Marshal shall hold office during good behavior does not have the effect of enlarging the term of office of one who was previously elected to hold during the term of the aldermen. *Greer* v. *Asheville*, 678.

2. The term of office of a City Marshal appointed under a charter providing that marshals should hold office during the official term of the aldermen is not enlarged from one to two years by an amendment to the charter extending the term of the aldermen from one to two years. *Ibid.*

TESTIMONY:

1. Where, on the trial of an action, testimony prejudicial to the one side or the other is admitted, but is withdrawn from the jury with all necessary cautions and no injury could have resulted from its introduction, a new trial will not be granted. *Allen* v. *Allen*, 121.

2. When admissible as to similar offences other than those charged in bill of indictment, 783.

TESTIMONY, Corroborative:

Where the testimony of a witness (even when he is a party to the action) is impeached he may be corroborated by showing that he has made similar statement about the transaction testified to—such corroborating testimony not being intended to prove the principal facts to be established, but to help the credibility of the witness just as evidence of his good character, etc. *Wallace* v. *Grizzard*, 488.

TESTIMONY, Impeaching:

In the trial of a material issue it was not competent to show by the plaintiff, on cross-examination, that at a previous trial the same issue had been found against him, for such fact could not impeach the witness nor throw light upon the pending issue, which depended upon the facts as testified to on the trial and not on what opinion the former jury had of the matter. *Grubbs* v. *Stevenson*, 277.

TESTIMONY, Irrelevant:

The fact that an electric street-railway company had caused it to be stated in a newspaper published in the city where it operated that its electric current was not a deadly one did not excuse an electric light company whose wires were stretched on the same street from using proper care in insulating its own wires against those of the street-railway, and the admission of such statement on the trial of an action against the electric light company for damages caused by its negligence was erroneous because of the irrelevancy of such testimony. *Haynes* v. *Gas Co.*, 203.

TOWN ORDINANCES, 787, 819, 855, 873:

1. Municipal corporations may, if there is no law to the contrary, prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may, by ordinance, prescribe; and, it seems, this may be done by or through the delegated authority of the Legislature, even where the enforcement of the law or ordinance causes a suspension of work previously contracted for. *State* v. *Johnson*, 846.

2. Where the Legislature has granted authority to a municipality to supervise or prevent the replacing of a roof with another of shingles, instead of constructing one of material less liable to destruction, an ordinance forbidding the owner of a building within a prescribed fire limit to alter or repair a wooden building within such limit, without the consent of the Board of Aldermen, is not unreasonable, and will be upheld. *Ibid.*

TOWN SUBSCRIPTION TO RAILROAD:

The only authority that can fasten upon a municipality an obligation to pay a subscription to a railroad is the duly ascertained vote of a majority of its qualified voters, and bonds issued without such vote being ascertained and declared are invalid even in the hands of an innocent purchaser. *Claybrook* v. *Commissioners*, 453.

TRIAL:

1. In an action to recover land the plaintiff must have the right to the possession not only at the institution of the suit but at the time of the trial also; hence, in the trial of such an action, where it appeared that the plaintiff had at the commencement of the action only an equity of redemption in the land, it was error to exclude testimony tending to show that between the commencement of the action and the trial the plaintiff had lost her equitable title. *Arrington* v *Arrington*, 116.
2. In the trial of an action it is the duty of the Judge to submit such issues arising on the pleadings as will present the whole matter in controversy and allow the introduction of all material evidence and on the responses to which the Court will be able to pronounce judgment on the merits. *Allen* v. *Allen*, 121.
3. Where, in an action for the recovery of land, the answer of the defendants set up equities on which substantial relief was demanded, and the plaintiff, in his reply, admitted a contract between himself and defendant's intestate for a sale of the land to the latter, and an interchange of a bond for the purchase-money and a bond for title, and averred his willingness to make title upon the payment of the bond for the purchase-money, which defendants alleged had been paid in full: *Held*, that it was not error to refuse to submit issues tendered by the plaintiff having no reference to the equities set up, but the Court properly submitted such as directed the attention of the jury to the question whether the purchase-money had been paid in full or in part. *Ibid.*
4. Where, on the trial of an action, testimony prejudicial to the one side or the other is admitted, but is withdrawn from the jury with all necessary cautions and no injury could have resulted from its introduction, a new trial will not be granted. *Ibid.*
5. In the trial of a material issue it was not competent to show by the plaintiff, on cross-examination, that at a previous trial the same issue had been found against him, for such fact could not impeach the witness nor throw light upon the pending issue, which depended upon the facts as testified to on the trial and not on what opinion the former jury had of the matter. *Grubbs* v. *Stevenson*, 277.
6. In the trial of an action to set aside as fraudulent a deed of trust from one brother to another it is in the sound discretion of the trial Judge to permit counsel to comment on the failure of the defendant to introduce as witnesses other parties to the transaction. *Bank* v. *Bridgers*, 383.

7. In an action against a Register of Deeds for wrongfully issuing a marriage license it was error to leave to the jury the question whether he made reasonable inquiry as to the age of the female. *Joyner* v. *Roberts*, 389.

8. When the plaintiff is entitled to recover in any view of the testimony, error in giving instructions in his favor is harmless and not ground for reversal of the judgment. *Kiser* v. *Combs*, 640.

9. Where, in the trial of an action, the verdict of a jury was set aside by consent, it was error to re-instate the verdict despite the objection of one of the parties, it not appearing affirmatively that the first order was procured by fraud. *Deaver* v. *Jones*, 649.

10. Where, in the trial of an indictment for larceny, there was conflicting evidence as to the manner in which the defendant took and carried from a store a piece of meat, it was proper in the Court to leave the question of felonious intent to the jury. *State* v. *Hill*, 780.

11. Where the Solicitor, in reply to a remark by the defendant's counsel that the defendant was a respectable white man, said to the jury that he himself was a colored man and that if the defendant was a colored man the jury would convict him in five minutes on the evidence, the error (if any) in permitting such remarks to the jury was cured by a caution by the Court, in its charge, not to be influenced by the remark complained of. *Ibid.*

12. In the trial of an indictment for obtaining money under false pretenses it is competent, in order to show the *scienter* and intent, to prove other similar transactions by the defendant. *State* v. *Walton*, 783.

13. In the trial of an indictment for obtaining money under false pretenses by inducing the County Treasurer to cash an order represented by the defendant as being genuine, evidence offered by defendant as to the stub-book kept by him in the Register of Deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true. *Ibid.*

TRIAL BY JURY:

1. The guaranty of a trial by jury in the sixth and seventh amendments to the Constitution of the United States applies only to the Federal Courts, and is not a restriction on the States, which may provide for the trial of criminal and civil cases in their own Courts, with or without jury, as authorized by the State Constitution. *State* v. *Whitaker*, 818.

2. Under Art. I, sec. 13 of the Constitution of North Carolina, the Legislature may provide for the trial of petty misdemeanors in inferior Courts without a jury, provided the right of appeal is preserved. *Ibid.*

3. Where, in the trial of two persons for murder, it appeared that in a mutual affray and an unequal contest between the deceased, who was unarmed, and the two defendants, one of the latter threw deceased to the ground and held him there while the other procured an axe and crushed his skull, it was not error to instruct the jury that the defendants were guilty of murder, the circumstances of the holding by one and the hitting by the other defendant being inconsistent with the legal conception of a killing in the heat of passion engendered in an encounter. *State* v. *Coley*, 879.

4. It is the right of a defendant to be present when anything is said or done at the trial that may prove prejudicial to his interests; but where no instructions were given to the jury in the absence of the defendant he cannot complain that the Court, in his absence, asked the jury if they desired any further instructions. *Ibid.*

5. Where, in the trial of one charged with carrying concealed weapons, he testified that he carried it for the purpose of selling it, the trial Judge properly instructed the jury, in effect, that there was no evidence to go to the jury to rebut the presumption of guilt which the statute raised from the possession, about his person and off of his own premises, of a concealed deadly weapon. *State* v. *Dixon*, 850.

6. In the trial of a defendant charged with bastardy an instruction by the Court that the affidavit of the woman that the defendant was the father of the child was presumptive evidence against the defendant was proper and followed the statute, section 32 of *The Code*. *State* v. *Cagle*, 835.

7. In the trial of an action the trial Judge may hand his instructions, in writing, to the jury, and it is not error, after they have retired and requested him to do so, to send a written memorandum of certain dates necessary to be remembered in order to enable them to reach a conclusion. *Ibid.*

8. In the trial of bastardy proceedings a witness for the State, in reply to a question on cross-examination, said, "I do not keep a bawdy-house": *Held*, that such answer was conclusive, and could not be contradicted by hearsay evidence as to the bad character of the witness. *Ibid.*

9. Bastardy proceedings, being under section 35 of *The Code* (as held in *State* v. *Burton*, 113 N. C., 655, and *Myers* v. *Stafford*, 114 N. C.,

234) a criminal action in respect to the fine directed to be imposed, properly stands for trial on a day set apart for the trial of criminal actions only. *Ibid.*

TRUST:

1. Upon the death of one partner the law vests the title to the partnership assets in the survivor in trust to pay the firm debts and divide the remainder between himself and the administrator of deceased partner. *Weisel* v. *Cobb*, 22.

2. Where a firm of merchants gave to manufacturers of fertilizers their note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin* v. *Maddrey*, 89.

3. A devise of real and personal estate to J. in trust for E. (a married woman), with no limitations over and no duties to be performed by the trustee, is a dry, naked or passive trust and vests the legal title in the property to E. under the statute of uses. *McKenzie* v. *Sumner*, 425.

4. In such case E. is entitled to have the personal property conveyed and delivered to her and the trust therein terminated. *Ibid.*

TRUST, Bequest in, 241.

TRUST, Breach of: See "BREACH OF TRUST."

TRUST DEED, 590:

Where an administrator sold land, taking grantees' notes for balance of purchase-money, containing a stipulation that they were not payable or transferable until all liens and liabilities on and against the lands should be discharged, and such notes were secured by a deed of trust under which the trustee was preparing to foreclose, and vendees sought an injunction upon the ground that there were various claimants for parts of the land and suits pending for one-sixth of it, to which the administrator replied that those matters had been passed upon by the vendees' attorney and that the vendees bought with full knowledge of the pending suits and conflicting claims and that the stipulation in the notes referred only to judgments against decedent's estate, which had since been paid, and to the balance of a mortgage debt due by decedent's estate, which would be paid out of the money to be paid by plaintiffs (the vendees): *Held*, that it was proper to continue the injunction to the hearing. *Atkinson* v. *Everett*, 670.

TRUST FUNDS:

Trust funds must be managed exclusively in the interest of the beneficiary, and cannot be employed so as to work a benefit or profit to the trustee. *McEachern* v. *Stewart*, 370.

TRUST, Resulting, what is not:

Where a husband with his own money purchases and improves land, putting the title in the wife, there is no resulting trust in favor of the husband, but a gift to the wife, both of the land and the improvements, is presumed from the relation of the parties. *Arrington* v. *Arrington*, 116.

TRUSTEE, 590:

1. Where the trustee in a deed of assignment for the benefit of creditors was the son of the assignor, and a minor, and there was no finding by the Court below that he was unsuitable or unreliable because of mental deficiency or moral obliquity, and, in a proceeding to remove him, he offered to give bond in double the amount of property in his hands, it was error to remove him and appoint a receiver of the property. *Branch* v. *Ward*, 148.
2. A devise of real and personal estate to J. in trust for E. (a married woman), with no limitations over and no duties to be performed by the trustee, is a dry, naked or passive trust and vests the legal title in the property to E. under the statute of uses. *McKenzie* v. *Sumner*, 425.
3. Where a deed of trust to secure a debt empowers the trustee to advertise and sell the property in case of default in the payment of the debt and directs him to apply the proceeds of sale to the discharge of the debt and to the payment of "expenses" of the trust, including "five per cent. commissions" to the trustee, the latter, after default in the payment of the debt and advertisement of the sale, is entitled to his commissions and reasonable counsel fees paid by him in the execution of the trust, notwithstanding the tender, by one having a second lien, of the amount of the debt secured by the deed and though the sale, by reason of a restraining order, is not made. *Cannon* v. *McCape*, 580.

TRUSTEE, Insolvent:

Where the insolvency of a trustee in a deed of assignment was questioned and it was positively alleged by the plaintiff, and the defendants simply alleged their belief that he was not insolvent; and, upon being required to give bond, the trustee refused so to do: *Held*, that it was proper to appoint a receiver to take charge of the assigned estate pending the litigation. *Bank* v. *Bridgers*, 381.

TRUSTEE AND CESTUI QUE TRUST, 343, 370.

UNBORN CHILDREN:

Under a deed to a woman "and her children" a child *en ventre sa mere* at the date of the conveyance will take, but children born more than a year thereafter will not. *Heath* v. *Heath*, 547.

UNDERTAKING:

The requirement of section 341 of *The Code* that a plaintiff shall give an undertaking before an injunction can be granted, is mandatory. *James* v. *Withers*, 474.

VENDEE OF HOMESTEADER:

1. The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner* v. *Batts*, 496.

2. A judgment debtor, being the owner at the time of the docketing of a judgment against him of White Acre, sold and conveyed it to another and received, in part payment, a conveyance of Black Acre; upon the issuance of execution he selected Black Acre, which was worth less than $1,000, and insisted upon his right to have the deficiency made up out of White Acre: *Held*, that he had the right to select his homestead in any land which he owned at the date of docketing the judgment and the deficiency, after the allotment of Black Acre, should be made up to him out of White Acre. *Ibid.*

VENDOR'S LIEN:

1. The equitable lien of a vendor for the purchase-money of land does not exist in this State. *Draper* v. *Allen*, 50.

2. A vendor who has conveyed land by deed has no lien for unpaid purchase-money and can reserve none except by taking and having registered his security in writing. *Quinnerly* v. *Quinnerly*, 145.

VENDOR AND VENDEE:

An agreement to take a deed without warranty is not a waiver of the right to demand a clear title. *Leach* v. *Johnson*, 87.

VERDICT (see, also, "SPECIAL VERDICT"):

1. Where, in the trial of an action, the verdict of the jury was set aside by consent, it was error to re-instate it despite the objection of one of the parties, it not appearing affirmatively that the first order was procured by fraud. *Deaver* v. *Jones*, 649.

2. Where, upon an indictment containing two counts, one of which is good, there is a general verdict of guilty, the verdict will be presumed to be on the valid count and will support the judgment. *State* v. *Lee*, 844.

3. Where a verdict of guilty was set aside in the discretion of the Judge and a new trial was heard upon another bill, there was nothing to support a plea of former conviction, for if the first indictment was defective so as to warrant arrest of judgment the defendants cannot be considered as having been in jeopardy. *Ibid.*

WARRANTY, Mutual covenants of:

Where there have been a conveyance and reconveyance of land with covenants of warranty, in order that they may cancel each other they must be *like* covenants; therefore, where C. conveyed to S. with *special* warranty and S. reconveyed to C. with general warranty the covenants do not mutually cancel each other, and, upon eviction by a stranger under a paramount title C. or his heirs may recover damages for the breach from S. or his heirs. *Carter* v. *Long*, 187.

WATER-WORKS, 178.

WIFE'S SEPARATE ESTATE, Disposition of by husband without her consent:

Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same. *Branch* v. *Ward*, 148.

WILL, 425.

WILL, Construction of:

1. A testator devised a life estate in a part of his lands to his wife, with remainder to the two children of a deceased son, provided that if said children should die "leaving no lawful heir (either or both of them) of their own body" the remainder should go to the children of another son and daughter of the testator; the children of the second son and daughter were provided for in another part of the will: *Held*, that the testator intended the share of his realty, set apart to the two children of the first son, as a provision, primarily, for each of them at all events during their lives, and in case both should leave issue them surviving, then to vest moiety in the issue of each, but if only one should die leaving a child or children such surviving issue to take the whole. *Dunning* v. *Burden*, 33.

2. Where a wife declared in her will that if her husband should pay off and discharge all the debts contracted by him prior to his marriage with her he should take and hold all her estate absolutely and for his own sole use and benefit, the discharge by the husband, in his life-time, of his debts of that class *eo instanti* vested in him the absolute title to the estate so devised, and it became subject to his debts contracted subsequently to the marriage. *Johnson* v. *Gooch*, 62.

3. In the construction of a will the intent of the testator, as ascertained from the consideration of the whole will in the light of the surrounding circumstances, must govern. *Holt* v. *Holt*, 241.

4. In a disposition by will no words are necessary to enlarge an estate devised or bequeathed from one for life into one absolute or in fee, and, generally, restraining expressions are necessary to confine the gift to the life of the legatee or devisee. *Ibid.*

5. A testator, after providing for his widow and making equal distribution of his property among all his children except A., a bachelor son, who, he seemed to fear, would dissipate his share, bequeathed to trustees thirty thousand dollars, "to be by them held in trust for my son A.; and this I intend as A.'s full share of my estate; and they shall from time to time use so much interest, as it accrues, for his decent support, but not for his excessive indulgence; any balance of interest is to be invested"; there was a residuary clause specifying several sources from which the residuum might be derived, but none embraced the remainder of the fund given to A.; in the disposition of the life estates in other parts of the will the intention of the testator was clearly expressed: *Held*, that the trustees, after paying over so much of the interest as was necessary for A.'s decent support, held the balance for his benefit and subject to such disposition as he might make thereof by will, or, in case of his intestacy, to go to his distributees. *Ibid.*

WILL MADE IN ANOTHER STATE, How construed:

A will made in another State will be construed according to the common law as expounded by the decisions of this Court, in the absence of proof that a different law or construction prevails in such other State. *Benbow* v. *Moore*, 263.

WITNESS:

1. Where a witness is impeached, either by contradictory testimony, on cross-examination, or by attack upon his character, his declarations to a third person, made soon after the transaction, may be stated by himself and afterwards shown by such third person in way of corroboration. *State* v. *Staton*, 813.

2. A witness may be compelled, at the instance of a party who is examining him, to inspect a writing which is present in court and in his own handwriting, or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates. *Ibid.*

3. Where a writing relates to collateral matters and a defendant on trial could derive no benefit from compelling a witness for the prosecution to inspect it, the refusal of the Court to compel witness to refresh his indistinct recollection of the matter is a harmless error and not reversible. *Ibid.*

4. Where, in a trial of defendant for arson, the prosecuting witness testified that the defendant told him that he sold the cotton taken from the barn to W., who was neither a party nor witness, it was not error to refuse to allow the defendant to prove that W. was a man of good character. *Ibid.*

5. In the trial of bastardy proceedings a witness for the State, in reply to a question on cross-examination, said, "I do not keep a bawdy-house": *Held*, that such answer was conclusive, and could not be contradicted by hearsay evidence as to the bad character of the witness. *State* v. *Cagle*, 835.

6. A witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question. *State* v. *Coley*, 879.

7. It is settled that the Legislature may by a saving clause in an act retain the provisions of the existing law in force as to all crimes committed prior to its passage; hence, the Act of 1893, changing the degrees of homicide and providing unequivocally that it should operate prospectively, does not apply to homicides theretofore committed. *Ibid.*

WRIT OF PROHIBITION: See "PROHIBITION, WRIT OF."

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